Supreme Court, U.S.
FILED

011133 JAN 29 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

BRENDA O. SINGER, *et al.*,

Petitioners,

v.

CITY OF ALABASTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
FITZPATRICK, COOPER & CLARK LLP
Attorneys for Petitioners
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

53 pp

QUESTIONS PRESENTED

1. Whether a suit by voters under 42 U.S.C. § 1983 alleging the denial of the right to vote must be dismissed for lack of jurisdiction when the defendant municipality has failed to comply with Section 5 of the Voting Rights Act of 1965?

2. Whether the preclearance requirements of Section 5 of the Voting Rights Act of 1965 takes precedence over the individual rights of persons denied a vote when a municipality fails to comply with Section 5?

PARTIES TO THE PROCEEDINGS

Petitioners:

Brenda O. Singer

Patsy H. Cannon

Gwen Dill

John D. Harmon

Respondents:

City of Alabaster, an Alabama Municipal Corporation

Steve Rauch, in his official capacity as Mayor of the City of Alabaster

Bobby Lee Harris

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
A. Proceedings in the Circuit Court of Shelby County, Alabama.	3
B. The Undisputed Facts.	4
C. The Decision of the Supreme Court of Alabama.	6

Contents

	Page
Reasons for Granting the Writ	7
I. This Court Should Decide The Unresolved Issue Of Whether A Municipality's Failure To Comply With Section 5 Insulates It From Claims By Voters Asserting A Denial Of Their Constitutional Right To Vote.	7
II. The State Court's Decision Conflicts With This Court's Decisions Confirming That The Right To Vote Is Absolute And Cannot Be Abridged.	11
III. This Case Presents An Issue Of National Importance For Review By This Court.	13
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Brooks v. Hobbie, 631 So. 2d 883 (Ala. 1993) 9

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) 14, 15

City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979) 10

City of Rome v. United States, 446 U.S. 156 (1980) .. 10

Hathorn v. Lovorn, 457 U.S. 255 (1982) 10

Kramer v. Union Free School Dist., 395 U.S. 621(1969) 11, 12

Reynolds v. Sims, 377 U.S. 533 (1964) 11

Terrell v. City of Bessemer, 406 So. 2d 337 (Ala. 1981) 9

Federal Statutes:

42 U.S.C. § 1983 ..... *passim*

Section 2 of the Voting Rights Act of 1965 3

§ 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ..... *passim*

Page

State Constitution and Statutes:

Alabama Constitution of 1901, Art. I §§ 1, 2, and 343 3

Code of Alabama, 1975, §§ 11-49-69(a)(1) and (4) .. 3, 8

Code of Alabama, 1975, §§ 11-46-2 8

Code of Alabama, 1975, §§ 11-46-72 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Alabama Released November 9, 2001 ..... 1a

Appendix B — Order Of The Alabama Circuit Court Of Shelby County, Eighteenth Judicial Circuit Dated And Filed September 22, 2000 ..... 17a

Appendix C — Complaint And Statement To Contest Municipal Election Dated August 28, 2000 .... 21a

Appendix D — Constitutional And Statutory Provisions Involved 27a

Petitioners Brenda O. Singer, et al., respectfully pray that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the Supreme Court of Alabama entered on November 9, 2001 in appeal number 1000093. Pet. App. 1a. That order upheld an unreported order entered by the Circuit Court of Shelby County, Alabama dated September 22, 2000. Pet. App. 17a. In this case, the City of Alabaster denied 101 legal voters the opportunity to have their votes counted in a City Council election because the City had not adopted a district plan that was approved under § 5 of the Voting Rights Act of 1965. Petitioners' suit under 42 U.S.C. § 1983 to enforce their constitutional rights by nullifying the election until the City adopted a lawfully precleared district plan was dismissed by the state courts. Petitioners contend that this Court should reconcile the competing interests between the policies of § 5 and the individual constitutional right to vote of the petitioners.

OPINIONS BELOW

The decision of the Supreme Court of Alabama has not yet been reported in the Southern reporter. The manuscript citation is *Singer v. City of Alabaster*, [MS. 1000093, Nov. 9, 2001] __ So. 2d __ (Ala. 2001). The decision of the Circuit Court of Shelby County, Alabama in case no. CV-00-850 is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Alabama issued its decision affirming the lower court's order on November 9, 2001. No petition for rehearing was filed. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners challenge the respondent City of Alabaster's conduct as violative of the equal protection requirements of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution. *See* Pet. App. 27a. The state courts found they were divested of jurisdiction by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Pet. App. 27a.

STATEMENT OF THE CASE

This appeal challenges the decision of the City of Alabaster, Alabama to disenfranchise entirely some 101 of its citizens during recent City Council elections. The action was originally filed as a state law statutory election contest by four petitioners of the City of Alabaster and a complaint under 42 U.S.C. § 1983 alleging violations of rights guaranteed by the Fourteenth and Fifteenth Amendments. Pet. App. 24a. All four voters are qualified voters residing in a subdivision known as "Weatherly" located in the City of Alabaster. All four voters had their votes disallowed in the City Council election conducted by the City of Alabaster on August 22, 2000. It is undisputed that if these four voters' ballots had been counted, along with ninety-seven (97) other similarly situated voters, that respondent Bobby Lee Harris would not have been elected Ward One Council Member and his opponent would have been elected. The voter-petitioners seek review of the dismissal of their claims.

A. Proceedings in the Circuit Court of Shelby County, Alabama.

Petitioners filed this action in the Circuit Court of Shelby County on August 28, 2000. Pet. App. 4a, 21a. The complaint sought a declaratory judgment nullifying the election and a preliminary and permanent injunction enjoining the City of Alabaster from filling the contested seat until the Court could rule upon the merits. Pet. App. 24a, 25a. The named defendants were the City of Alabaster, its Mayor and Bobby Lee Harris, the incumbent City Council member from Ward 1 and the candidate that Alabaster declared as the winner after the August 22, 2000 election. Pet. App. 22a. Petitioners alleged that the defendants' actions violated their rights under the provisions of the Constitution of the State of Alabama, Art. I §§ 1, 2, and 34, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, as made enforceable by 42 U.S.C. § 1983. Petitioners also alleged that such actions of the defendants violated § 2 of the Voting Rights Act of 1965. Finally, petitioners asserted a properly grounded contest of the election under Code of Alabama, 1975, §§ 11-49-69(a)(1) and (4). Pet. App. 4a, 5a, 17a.

The defendants answered the petitioners' complaint by claiming that Section 5 of the Voting Rights Act of 1965 provided authority for excluding these voters from the electoral process. C 22, 47. The defendants also filed motions to dismiss. Pet. App. 4a, 18a; C 33. Defendants claimed that because the City had not obtained Section 5 preclearance of its placement of the 101 voters in Ward 1 or any other electoral district, they were justified in excluding the 101 voters from voting in any City Council elections. *Id.*

After a hearing on the motions conducted on September 18, 2000, the Circuit Court issued an Order on September 22,

2000 granting the motions to dismiss. The Court did not reach the merits of plaintiffs' claims, but instead dismissed the case, stating in part, "A state court must not order relief that violates federal law . . . The Alabama Supreme Court has held that 'cases involving the interpretation of the preclearance requirements of § 5 of the [F]ederal Voting Rights Act are within the exclusive jurisdiction of the federal courts.' " Pet. App. 19a.

Petitioners filed a timely Notice of Appeal to the Supreme Court of Alabama on October 5, 2000. C 112.

B. The Undisputed Facts.

This case seeks review of the dismissal of a complaint on initial motions to dismiss. Accordingly, the allegations of the verified complaint should be accepted as true in reviewing this matter. Indeed, the defendants substantially admitted the material facts of the complaint.

During the years 1994-1996, the City of Alabaster (hereinafter referred to as "City") annexed several tracts of land located in the Weatherly subdivision in Shelby County, Alabama. Pet. App. 2a, 19a, 23a. The petitioners are residents of the subject tracts that were annexed pursuant to Alabaster City Ordinances No. 94-338 and No. 96-410. Pet. App. 22a. In compliance with state law, the City placed the parcels which are the subject of the Weatherly annexation into Ward 1 for purposes of City Council representation. Pet. App. 2a, 3a.

At the time that the annexation ordinances were approved in 1994-96, the City did not seek preclearance from the U.S. Department of Justice under Section 5 of the Voting Rights Act of 1965. The first effort to obtain preclearance by

the Attorney General was made in 2000. Pet. App. 3a. On July 10, 2000, the Department of Justice requested additional information from the City regarding these annexations. Pet. App. 3a. On August 16, 2000, the Department of Justice responded to the City's submissions stating,

> [t]he Attorney General would normally postpone a decision on the merits of your submission until the city responded fully and accurately to our July 10, 2000, letter. However, the city has asked us to issue a substantive Section 5 determination regarding the submitted changes based on the current incomplete record because of the city's fast approaching August 22, 2000, election.

C 40. The Department of Justice went on to state that it did not object to the annexation ordinances No. 94-338 and No. 96-410, but that it objected to the assignment of the annexed lands to Ward One. Pet. App. 3a; C 40, 43.

The complaint alleged that

> on August 21, 2000, the City Council of Alabaster met in secret session, in violation of the Alabama Open Meetings Act, and agreed not to allow the votes cast in the Weatherly subdivision to be counted in the Ward 1 Council race or any other Council election to be held the following day.

Pet. App. 23a. The municipal defendants did not answer this allegation. C 21.

On August 22, 2000, the City of Alabaster held the regularly scheduled election for the offices of Mayor and

members of the City Council of Alabaster. Pet. App. 4a. The residents of the Weatherly annexed tracts were permitted to vote for the office of Mayor, but subsequently had their votes disallowed for the office of Ward 1 council member. *Id.* Nor were their votes counted for any other city council member election. *Id.* Ninety-three persons from the contested annexation area voted, and all ninety-three persons voted for Ward 1 candidate Todd Goode.[1] C 4, 21, 46, 61.

According to the observer from the U.S. Department of Justice, in the August 22 election, 714 persons cast ballots in Ward 1 for City Council. C 61. Three hundred eighty-eight (388) ballots were cast for Todd Goode. *Id.* Three hundred twenty-six (326) were cast for Bobby Lee Harris. *Id.* However, one hundred one (101) ballots were disallowed that had been cast for candidate Goode. *Id.* Thus, the City certified the results as follows: Bobby Lee Harris, three hundred twenty-six (326) votes; and Todd Goode, two hundred eighty-seven (287) votes. *Id.* The remaining one hundred one (101) votes [ninety-three (93) in person ballots, and eight (8) absentee ballots] were not tallied in any race for City Council. Pet. App. 4a; C 46, 61.

C. The Decision of the Supreme Court of Alabama.

The Supreme Court of Alabama affirmed the circuit court's dismissal of the complaint. Pet. App. 1a. Finding that all actions involving § 5 of the Voting Rights Act of 1965 are within the exclusive jurisdiction of the federal courts and furthering finding that this case "arises under" § 5, the

---

1. There were also 8 absentee ballots cast from these same excluded parcels. All 8 of these ballots were also cast for Mr. Goode. C 61.

Court found that the state courts are divested of jurisdiction over all matters raised in the complaint. Pet. App. 10a.

In response to petitioners' claim that this case was not brought to enforce § 5, the Supreme Court found that "state jurisdiction can exist only if a full adjudication of the plaintiffs' lawsuit is possible without consulting § 5." Pet. App. 7a. The Court found that the remedy of "nullifying the Ward 1 election and delaying a second vote until the City has obtained preclearance, likewise directly involve[s] the application of § 5." Pet. App. 8a.

Two members of the Supreme Court of Alabama dissented, finding that the remedy of nullification should have been granted and the election delayed until the City obtained § 5 preclearance. Pet. App. 11a, 16a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Decide The Unresolved Issue Of Whether A Municipality's Failure To Comply With Section 5 Insulates It From Claims By Voters Asserting A Denial Of Their Constitutional Right To Vote.

This case presents the question of first impression of whether the mere fact that a municipality has failed to comply with Section 5 of the Voting Rights Act of 1965 renders a lawsuit by adversely affected voters one that "arises under" Section 5. Petitioners recognize that while the interests of § 5 are important and must be protected, nothing in the statute is intended to divest federal or state courts of jurisdiction to adjudicate claims to enforce constitutional rights under 42 U.S.C. § 1983.

In this case, there is no dispute that the 101 voters were lawfully annexed into the City of Alabaster and the annexation was approved by the Attorney General under § 5. Pet. App. 3a. There is also no dispute that the assignment of the annexed lands of the 101 voters to Ward 1 was not approved by the Attorney General. *Id.* There is no dispute that the votes of the 101 voters were not counted in the Ward 1 election or any other council race. Pet. App. 4a.

Petitioners filed a lawsuit designed to protect their right to vote as well as the purposes of § 5 of the Voting Rights Act. Petitioners sought an order nullifying the August 22, 2000 election they were excluded from and maintaining the status quo[2] until the City complied with § 5 of the Voting Rights Act. Pet. App. 24a, 25a. While the principles of § 5 are important and should be honored, nothing in the Voting Rights Act divests courts of jurisdiction to decide a suit under 42 U.S.C. § 1983 or permits a municipality to escape liability for a blatant denial of the constitutional right to vote.

Petitioners' suit was carefully designed to balance the competing interests of § 5 and the right of the individual to vote. Petitioners' suit did not seek relief that was inconsistent with § 5. Petitioners sought to protect their individual rights until the City met its obligations under the Voting Rights Act.

---

2. Under Alabama election statutes, municipal elections are held on the fourth Tuesday in August. Special elections may be held "when ordered by the municipal governing body." Code of Alabama, 1975, § 11-46-2. If an election is delayed, "the incumbent officers shall remain in office until their successors shall be elected and qualified." Code of Alabama, 1975, § 11-46-72. Here, respondent Harris was also the incumbent. Nullification of the August 2000 election would have simply extended his term until an election from a properly precleared district could be conducted.

The state courts held that they were without jurisdiction to adjudicate claims under 42 U.S.C. § 1983 because this case "arises under" § 5 of the Voting Rights Act. But, no claims have been asserted under § 5 by the petitioners — nor could they have been. There is no dispute that the City has not complied with § 5. There is also no dispute that the Attorney General did not preclear the current districting plan. Petitioners have no right to file a claim in the U.S. District Court for the District of Columbia to compel approval under § 5.[3] They had no control over the City's failure to comply with § 5. Petitioners took the only action possible, they filed a suit claiming the denial of their individual constitutional right to vote.[4]

No decision of this Court suggests that any collateral involvement of § 5 to a voting controversy divests state courts from jurisdiction to decide a claim for denial of the right to vote. In fact, this Court has made clear that state courts have the authority to determine issues collateral to preclearance, such as whether § 5 applies to specific voting changes:

> Granting state courts the right to decide, as a collateral matter, whether § 5 applies to contemplated

3. Section 5 provides that only the "State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment . . ." that an election practice meets the standards of the Voting Rights Act. 42 U.S.C. § 1973c; Pet. App. 28a.

4. Alabama courts have long exercised concurrent jurisdiction over actions filed under 42 U.S.C. § 1983 to enforce federal constitutional rights. *Brooks v. Hobbie*, 631 So. 2d 883, 888 (Ala. 1993) and cases cited therein; *Terrell v. City of Bessemer*, 406 So. 2d 337 (Ala. 1981) ("this day henceforth, courts of this state must accept jurisdiction over claims brought under 42 U.S.C. § 1983").

> changes in election procedures will help insure compliance with the preclearance scheme. Approval of this limited jurisdiction also avoids placing state courts in the uncomfortable position of ordering changes that they suspect, but cannot determine, should be precleared under § 5.

Hathorn v. Lovorn, 457 U.S. 255, 268-69 (1982). Here, the role of § 5 is far more marginal. There are no § 5 issues to decide. The only issue is whether a remedy may be fashioned to protect individual constitutional rights while § 5 interests are respected. The decision of the Supreme Court of Alabama leaves voters like petitioners without any remedy when their local government fails to comply with § 5 of the Voting Rights Act. Review by this Court is necessary to reconcile the obligations of § 5 with the constitutional imperative of the right of the individual to vote.

While this Court has previously dealt with difficulties of implementing the requirements of § 5 in the case of a jurisdiction that drags its feet for many years, *City of Rome v. United States*, 446 U.S. 156 (1980), it has never reconciled the competing interests of the individual right to vote with § 5.[5] Review by this Court is necessary to resolve this question.

---

5. These competing interests were recognized, but not addressed, in the lower court's decision in *City of Rome v. United States*, 472 F. Supp. 221, 241-42 (D.D.C. 1979) (three judge court).

II. The State Court's Decision Conflicts With This Court's Decisions Confirming That The Right To Vote Is Absolute And Cannot Be Abridged.

The decision of the Supreme Court of Alabama dismissing petitioners' claims under 42 U.S.C. § 1983 for violation of rights secured by the Fourteenth and Fifteenth Amendments to the Constitution of the United States conflicts with the Court's many decisions recognizing that the right to vote is absolute.

In a well-established line of authority beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has clearly and forcefully articulated both the substance and contours of the constitutional right to vote:

- "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. at 554.

- The right to vote can neither be diluted nor denied outright. *Id.* at 555; *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969).

- "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast a ballot and have them counted." *Reynolds v. Sims*, 377 U.S. at 555.

- "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the

> governmental affairs which substantially affect their lives." *Kramer v. Union Free School Dist.*, 395 U.S. at 626-27.

- "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 37 U.S. at 562; *Kramer*, 395 U.S. at 626.

It is without dispute that 101 voters in Alabaster, Alabama have been completely disenfranchised from participation in their City Council elections. Although they reside in a subdivision that was lawfully annexed to Alabaster, their votes in the most recent City Council election were not counted because of the City's own failure to obtain § 5 approval of its electoral-district plan. Their exclusion is undisputed. It was admitted by counsel for the City, "that the people here were denied the right to vote . . ." R 50. The record further reflects:

> The Court: So the position then, the position of the defendants is that the — well, the residents within that particular area of Weatherly just won't be able to have any say so at all in the city council elections because of what happened; is that correct?
>
> Mr. Head [City's counsel]:
> Well, I will say in this particular city council election.

R 30.

The record similarly reflects elsewhere:

> The Court: Don't they get to vote somewhere, though, Frank? I mean, all the cases that you have, they ultimately get to vote somewhere.
>
> Mr. Head: No, they don't get to vote.
>
> The Court: They don't get to vote at all?
>
> Mr. Head: No . . .

R 51.

Petitioners' lawsuit sought relief for the denial of their voting rights guaranteed by the Fifteenth Amendment and denial of their equal protection rights guaranteed under the Fourteenth Amendment. Their suit to enforce those rights under 42 U.S.C. § 1983 was summarily dismissed. Nothing in the Voting Rights Act was intended to impair the rights of individuals to vote on an equal basis. This Court should grant review to resolve this conflict between the decision of the Supreme Court of Alabama and this Court's decisions protecting the right of the individual to vote.

III. This Case Presents An Issue Of National Importance For Review By This Court.

This Court should address the unresolved issue of whether the individual constitutional right to vote may be vitiated as a result a municipality's failure to meet its obligations under § 5 of the Voting Rights Act. Petitioners believe the Alabama courts were wrong in their conclusion that they have no jurisdiction to entertain an action to enforce

constitutional rights simply because the defendant municipality had failed to comply with § 5. The rights of the individual to vote should not be abridged, especially in a case like this where a remedy is available that respects the policy of § 5 yet preserves the right of the individual to vote. The City of Alabaster claimed that a delay in the election until after it could obtain § 5 preclearance was unrealistic. But, such a delay would have preserved the rights of all individuals to vote.

This Court addressed this very concern just last year: "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388, 401 (2000), *see also id.*, at 412 (Stevens, J., dissenting). Stated otherwise, the desire of the City of Alabaster to avoid expense and the delay of the election did not justify the actions of the City to proceed with this election. This Court in *Bush* went on to state:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by latter arbitrary and disparate treatment, value one person's vote over another. *See, e.g., Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966) ([O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the

> free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Bush v. Gore, 148 L. Ed. 2d at 398. Here, the rights of the 101 voters that were denied the opportunity to vote in any City Council election were summarily denied by the respondent City of Alabaster. And, the courts have said there is no jurisdiction to consider their claims.

CONCLUSION

Petitioners request that this Court grant their petition for writ of certiorari and vacate the judgment of the Supreme Court of Alabama.

Respectfully submitted,

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
FITZPATRICK, COOPER & CLARK LLP
Attorneys for Petitioners
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

APPENDIX A — OPINION OF THE SUPREME COURT OF ALABAMA RELEASED NOVEMBER 9, 2001

OCTOBER TERM, 2001-2002

SUPREME COURT OF ALABAMA

1000093

Brenda O. Singer et al.,

v.

City of Alabaster et al.

Appeal from Shelby Circuit Court (CV-00-850)

BROWN, Justice.

Brenda O. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon (collectively referred to herein as "the plaintiffs") appeal from the Shelby Circuit Court's dismissal of their lawsuit contesting the results of the August 22, 2000, municipal election for the position of Ward 1 council member for the City of Alabaster ("the City"). We affirm.

Facts and Procedural History

The City is governed by a mayor, who is elected by a citywide vote, and seven city council members, who are elected by voting districts or "wards." The City's population is predominantly white; according to the 1990 Federal

decennial census, only 1,617 of the City's 14,732 residents are African-American.

In 1991, the City adopted a redistricting plan for its seven wards to reflect annexations and natural population increases. On December 30, 1991, the City obtained "preclearance" from the United States Attorney General ("the Attorney General") for its redistricting plan, as well as for its mayor-council form of government and its recent annexations, as required by § 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973c. Section 5 provides, in pertinent part, that covered jurisdictions (of which Alabama is one) may not enforce any change affecting voting without first receiving a preclearance determination from the Attorney General finding that the proposed change is not racially discriminatory in purpose or effect. Under the City's precleared redistricting plan, the population in one of the City's seven wards would be predominantly African-American, while the population in the remaining six wards would be overwhelmingly white. The City's precleared plan also provided that pursuant to §§ 11-46-20 and -21, Ala. Code 1975, nonpartisan municipal elections were to be held on the fourth Tuesday in August in those years in which there was a Presidential election.

Since the 1991 preclearance, the City has approved 58 new commercial and residential annexations. Two of those annexations were of areas in which the plaintiffs resided at the time of the August 22, 2000, municipal election. Those two annexations were within a broader area known as the Weatherly subdivision, an area where the population is predominantly white. After it annexed an area, the City

assigned the annexed area to a ward; the areas of the plaintiffs' annexations were both assigned to Ward 1, the only ward in which the population was predominantly African-American.

On May 31, 2000, the City sought preclearance from the Attorney General for its annexations and ward assignments made after the 1991 preclearance. On July 10, 2000, the Attorney General precleared all of the City's commercial annexations, but requested additional information as to population statistics, demographic shifts, and election data regarding the City's residential annexations. The City responded, but the Attorney General considered its answers to be incomplete. The Attorney General nevertheless recognized the need for an expedited decision because of the impending August 22, 2000, elections. Accordingly, the Attorney General issued an order preclearing all of the annexations, but not all of the ward assignments. Specifically, the order refused preclearance for the assignment of the plaintiffs' two annexed areas to Ward 1, stating that assigning those annexed areas to Ward 1 diluted the African-American vote in that ward and, thus, defeated the goal of the Voting Rights Act of 1965. The City immediately notified the Attorney General, in a letter dated August 17, 2000, that it would comply with the preclearance order by not counting the votes from these two annexed areas in the Ward 1 city-council race. The City also advised the Attorney General that it was unable to print new ballots for the two unprecleared annexed areas to Ward 1 before the upcoming election; however, it informed the Attorney General that it would accommodate the preclearance issue by having the voters in the two unprecleared annexed areas of the Weatherly subdivision vote at separate polling sites for the

Ward 1 city-council election, thereby segregating their votes from the rest of the precleared Ward 1 electorate so that their votes for the Ward 1 council member would not be counted.

The City held its municipal election on August 22, 2000, as planned. The Ward 1 city-council election involved a contest between Bobby Lee Harris, the incumbent, and Todd Goode, the challenger. In the precleared areas of Ward 1, Harris, an African-American, garnered 326 votes, while Goode, who is white, garnered 287 votes. A total of 103 ballots were cast in areas included in the two Weatherly subdivision annexations. All of the ballots included votes for mayor and all but two ballots included votes for Ward 1 city council. Pursuant to the City's promise to comply with the Attorney General's preclearance order, the City counted all the Weatherly subdivision votes for mayor but disallowed the votes in the two annexed areas for Ward 1 city council. The record suggests that all of the 101 votes cast in the Ward 1 city-council election by those residents in the Weatherly subdivision annexed areas were cast for Goode. Had those votes been counted, Goode would have won the race with 388 votes.

On August 28, 2000, the plaintiffs, who are among the 101 Weatherly subdivision voters whose ballots were not counted in the Ward 1 city-council election, sued the City, Steve Rauch (the mayor of the City of Alabaster), and Harris in the Shelby Circuit Court contesting the election result favoring Harris. The plaintiffs contended that disallowing their votes in the Ward 1 city-council election violated their federal and state constitutional rights to equal protection and their right to vote, guaranteed by § 2 of the Voting Rights

Act of 1965. The plaintiffs asked the circuit court to nullify the results of the election, or, alternatively, to order that the Weatherly subdivision votes from the two annexed areas be counted in the Ward 1 city-council election.

The defendants filed motions to dismiss, arguing that state courts lacked subject-matter jurisdiction over the case under § 5 of the Voting Rights Act of 1965. The circuit court agreed, holding that it could not fashion a remedy without "disregarding . . . clearly established federal law." The circuit court subsequently dismissed the case, and the plaintiffs appealed.

Discussion

The question presented in this appeal is whether the circuit court erred in dismissing the plaintiffs' action for lack of jurisdiction.

Under our federal system, state courts and federal courts are presumed to have concurrent jurisdiction over cases arising under federal law. Congress, however, may confer upon federal courts exclusive jurisdiction by means of an exclusive statutory directive. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Congress has pronounced that only federal courts can entertain "[a]ny action under this section [§ 5 of the Voting Rights Act]." 42 U.S.C. § 1973c. Accordingly, this Court, observing its constitutional duty to recognize the supremacy of federal law, has held that "cases involving the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal

courts." *Mitchell v. City of Prichard*, 538 So.2d 1, 2 (Ala. 1988). The dispositive question in the present case is whether the plaintiffs' action "arises under" § 5, thereby divesting state courts of jurisdiction.

The plaintiffs maintain that their action is an election contest, at the heart of which is a claim that they were unconstitutionally denied the right to vote in the August 22, 2000, Ward 1 election.[1] They argue that any nexus their claim may have with § 5 of the Voting Rights Act is merely incidental and, thus, does not prevent the Shelby Circuit Court from exercising jurisdiction. In so arguing, the plaintiffs assert that their cause of action accrues under state election laws rather than under § 5 of the Voting Rights Act.

The actual source of the plaintiffs' right to bring an action, however, is not necessarily determinative of the question whether their lawsuit "arises under" § 5. It is true that "[o]rdinarily, '[a] suit arises under the law that creates the cause of action.' " *Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826, 828 (11th Cir. 1992) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, (1916)). There are many instances, however, where claims brought under the color of state law nevertheless raise federal questions, thereby conferring upon federal courts subject-matter jurisdiction. As to these situations, the United States Supreme Court has said that federal subject-matter

1. In their complaint contesting the August 22, 2000, election, the plaintiffs claim that the City deprived them of their constitutional right to vote when it proceeded with the August 22, 2000, election before it obtained preclearance for the inclusion in Ward 1 of the areas annexed into the Weatherly subdivision.

jurisdiction exists where the plaintiff's right to relief "depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 28 (1983). We believe that federal-question jurisprudence extends to the present case, where state jurisdiction can exist only if a full adjudication of the plaintiffs' lawsuit is possible without consulting § 5.

The plaintiffs, in filing this election contest, have sought to nullify the results of the Ward 1 city-council election so that one of two remedies requested in their complaint can be ordered. Accordingly, in addition to nullification, the plaintiffs have asked the Shelby Circuit Court either (1) to conduct a recount of all votes cast in the Ward 1 election, including those votes from the annexed areas of the Weatherly subdivision that were originally excluded, or (2) to delay a second Ward 1 election indefinitely, pending the assignment of the allegedly disenfranchised Weatherly subdivision voters to a ward that has been precleared.

As to the first remedy the plaintiffs requested, the United States Supreme Court has clearly foreclosed the option of counting votes from unprecleared areas. In *Clark v. Roemer*, 500 U.S. 646 (1991), a federal district court in Louisiana permitted state judicial elections to go forward and allowed the winners of the elections to take office, even though the Attorney General had interposed valid objections to the election process for the judgeships. The Supreme Court, reversing the district court, held that " § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." *Clark*, 500 U.S. at 654.

In the present case, the Attorney General has likewise interposed an objection, refusing to preclear the City's inclusion in Ward 1 of the areas annexed in the Weatherly subdivision. Any remedy authorizing a recount to include votes from these unprecleared areas would necessarily contravene the Attorney General's objection. Therefore, ordering this remedy would effectively overturn the Attorney General's preclearance adjudication, something that § 5 allows only federal courts to do.

The second remedy the plaintiffs requested, which involves nullifying the Ward 1 election and delaying a second vote until the City has obtained preclearance, likewise directly involve the application of § 5. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), Chief Justice Warren, writing for the Court, observed:

> "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973l(c)(1) (1964 ed., Supp. I). See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). . . .
>
> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."

Allen, 393 U.S. at 565-66 (footnote omitted).

The Supreme Court later addressed the postponement of elections in *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985). In that case, several residents of Hampton County, South Carolina, and the NAACP, a civil rights organization, sued the Hampton County election commission and several other related defendants, seeking to enjoin a school-board election as illegal under § 5. The plaintiffs alleged that several election procedures had been changed, but had not been precleared, including the scheduled date of the school-board election.

Ironically, the election commission's decision to change the date of the school-board elections was the result of an attempt by the commission to comply with § 5. The commission changed the date of the school-board elections after the Attorney General had precleared a previously-submitted election plan. The preclearance of that plan by the Attorney General had the effect of nullifying an election previously held under the prior election rules. Therefore, in an effort to implement the new precleared plan, the commission scheduled a second election to occur on a special date. The federal three-judge panel held that, although implementation of the new election plan was a change under § 5, "the scheduling of the election and the filing period were simply 'ministerial acts necessary to accomplish the statute's purpose . . . , and thus did not require preclearance.' " *Hampton County*, 470 U.S. at 174. On appeal, the Supreme Court reasoned that its inquiry in § 5 cases was not whether the implemented election-procedure changes were actually discriminatory, but "whether the challenged alteration has the *potential* for discrimination." *Id.* at 181. Justice White, writing for the Court, concluded that changing the date of an

election had such potential, and the Supreme Court reversed the lower court. The Court held that changes regarding the date of an election — even when those changes affect only a single election cycle — require preclearance. *Id.*

In the present case, we are unable to afford the plaintiffs the relief they request without doing violence to § 5. The United States Supreme Court has made it clear that state courts, when considering a remedy altering an election process, must defer to the preclearance mandate of § 5. Specifically, the Court has said, "When a party to a state proceeding asserts that § 5 renders the contemplated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law." *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982). We are therefore confronted with a situation where we must make a § 5 preclearance adjudication before granting the plaintiffs their requested relief, or, indeed, any other relief with respect to the City's election procedures, something that § 5 clearly precludes our doing. For the same reason that state courts are powerless to grant relief to the plaintiffs, state courts are without jurisdiction to entertain the merits of the plaintiffs' claim, because a full adjudication — which, of course, includes the possibility of granting relief — requires consideration of a substantial question of law under § 5.

Appendix A

Conclusion

For the foregoing reasons, we affirm the Shelby Circuit Court's judgment of dismissal for lack of jurisdiction.

AFFIRMED.

See, Johnstone, Woodall, and Stuart, JJ., concur.
Lyons and Harwood, JJ., concur specially.
Moore, C.J., and Houston, J., dissent.

Appendix A

LYONS, Justice (concurring specially).

Under § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), a few states, including Alabama, are prevented from enforcing changes affecting voting practices without first obtaining approval from the Federal government. I believe that Justice Black was right when he dissented from the United States Supreme Court's upholding the validity of § 5 against constitutional attack in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Justice Black, in his dissent, made the following observations:

> "My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. . . . Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. . . . Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.' I cannot help but believe that the inevitable effect of any such law which forces any one of the States

to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. . . . A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

"I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected. The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments. Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state

> laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress — denied a power in itself to veto a state law — can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases — they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval."

Id. at 358-61 (footnote omitted).

As the majority points out, the United States Supreme Court has interpreted § 5's proscription against changes in state law without advance federal approval to bar a state court from ordering relief that would otherwise require preclearance if such action were taken by any other branch of state government. *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982). Under *Hathorn*, the approved practice requires submission of the claim for relief to the Attorney General before application is made to the court. The Court observed:

> "Our holding does not prevent state courts from attempting to accommodate both state and federal interests. *A state court, for example, might adopt the approach followed by the Chancery Court in this case, and order the parties to submit the proposed relief to the Attorney General.* If the Attorney General registers an objection, the court might then order the parties to seek a declaratory judgment from the District Court for the District of Columbia."

Id. at 270 n.24 (emphasis added).

On the record before us, there is no indication that the request for a court-ordered stay of the election has received federal approval pursuant to § 5.

While I share the angst expressed in Justice Houston's dissenting opinion, criticism of the result in this case should, I respectfully submit, be directed to Congress.

HARWOOD, J., concurs.

HOUSTON, Justice (dissenting).

I would grant the second remedy requested by the plaintiffs and nullify the Ward 1 election and delay a second election to fill the Ward 1 council seat until the City has obtained preclearance from the Civil Rights Division of the Justice Department. The very idea that this Court by its opinion deprives 101 registered voters, who voted, of their right to vote to keep from doing violence to § 5 of the Voting Rights Act of 1965, offends my sense of truth, justice, and the American way.

APPENDIX B — ORDER OF THE ALABAMA CIRCUIT COURT OF SHELBY COUNTY, EIGHTEENTH JUDICIAL CIRCUIT DATED AND FILED SEPTEMBER 22, 2000

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA EIGHTEENTH JUDICIAL CIRCUIT

CASE NO. CV-00-850

Brenda O. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon

Plaintiffs,

v.

City of Alabaster, an Alabama municipal corporation; Steve Rauch, in his official capacity as Mayor of the City of Alabaster; and, Bobby Lee Harris

Defendants.

ORDER

The cause is presently before the Court on the plaintiffs' complaint to contest the municipal election in the City of Alabaster held August 22, 2000. The allegation of the complaint is that the plaintiffs were denied the right to vote in the Ward 1 City Council election, disenfranchising them in violation of their Constitutional and statutory rights. The plaintiffs seek to nullify the election of Bobby Lee Harris as Councilman for Ward 1 of the City of Alabaster.

Appendix B

Also pending before the Court is a motion to dismiss this cause filed on behalf of Bobby Lee Harris, the City of Alabaster, and Steve Rauch in his official capacity as Mayor of Alabaster; hereinafter collectively referred to as defendants. The Court has also allowed the Attorney General of the United States, hereinafter referred to as the Attorney General, to participate in these proceedings as amicus curiae.

It is undisputed among the parties and participants that the election at issue is subject to the jurisdiction of § 5 of the Voting Rights Act of 1965. See *Perkins v. Matthews*, 540 U.S. 379 (1971). Specifically, no new voting practice is enforceable unless preclearance is obtained from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. "Congress designed the preclearance procedure 'to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process' " *Lopez v. Monterey County, California*, 519 U.S. 9 (1996). "Congress chose to accomplish this purpose by giving *exclusive authority* to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." *Id.* (Emphasis added). See also *McDaniel v. Sanchez*, 452 U.S. 130 (1981). By obtaining judicial preclearance, a covered jurisdiction, like the City of Alabaster, may obtain from the United States District Court for the District of Columbia, a declaratory judgment that the voting change would not have the purpose or effect of denying or abridging the right to vote on account or race or color. *Clark v. Roemer*, 500 U.S. 646 (1991).

Appendix B

In the instant case, the City of Alabaster sought preclearance from the Attorney General concerning the annexation of several tracts of land located in the Weatherly subdivision in the City of Alabaster. In addition to seeking approval of the annexation for mayoral purposes, the City also sought preclearance to place the annexed tracts in Ward 1 for purposes of City council representation. The City obtained preclearance for mayoral purposes; however, the Attorney General specifically refused to grant preclearance for the placement of the Weatherly tract Ward 1. Specifically, the Attorney General determined that the City failed to carry "its burden of showing that the designation of Ward 1 has neither a discriminatory purpose nor a discriminatory effect." (August 16, 2000 letter from the U.S. Department of Justice to the City Attorney). The Attorney General further determined that the residents of the annexed portions of the Weatherly subdivision could vote in the mayoral race but, **could not** vote in the Ward 1 City Council race. *Id.*

The relief sought by the plaintiffs in this cause, specifically to nullify the election of the City Councilman for Ward 1, to conduct a re-count of the votes cast in the Ward 1 City Council election and to grant a preliminary injunction to enjoin the filing of the office of Ward 1 Councilman would only be available through disregarding the clearly established federal law. A state court must not order relief that violates federal law. *Hathorn v. Lovorn*, 457 U.S. 255 (1982). The Alabama Supreme Court has held that "cases involving the interpretation of the preclearance requirements of Section 5 of the [F]ederal Voting Rights Act are within the exclusive jurisdiction of the federal courts." *Mitchell v. City of Prichard*, 538 So. 2d 1 (Ala. 1988). While

the Court is not unsympathetic to the plight of the plaintiffs in that they were unable to cast legal votes in the race for Ward 1 City Council representative[1] for the reasons set out previously in this Order, it is without authority to rule otherwise.

Accordingly, the plaintiffs' request for preliminary injunctive relief, as well as any and all other relief sought is hereby **DENIED**. Further, the defendants' motion to dismiss is due to be, and is hereby **GRANTED**.

DONE AND ORDERED on this the 22nd day of September, 2000.

s/ D. Al Crowson
D. Al Crowson
Circuit Judge

---

1. which Mr. Edward Still, counsel for Defendant, Bobby Harris concedes" . . . (for the purposes of the Motion to Dismiss and Motion for Preliminary Injunction) that all ninety-three (93) votes from the newly-annexed Weatherly residents were cast for Mr. Goode." See letter from Edward Still dated September 21, 2000. Mr. Goode was Bobby Harris' opponent.

APPENDIX C — COMPLAINT AND STATEMENT TO CONTEST MUNICIPAL ELECTION DATED AUGUST 28, 2000

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

Civil Action No.

BRENDA O. SINGER, PATSY H. CANNON, GWEN DILL, and JOHN D. HARMON,

Plaintiffs,

vs.

CITY OF ALABASTER, an Alabama Municipal Corporation; STEVE RAUCH, in his official capacity as Mayor of the City of Alabaster; and BOBBY LEE HARRIS,

Defendants.

COMPLAINT AND STATEMENT TO CONTEST MUNICIPAL ELECTION

PREAMBLE

This is an action under Alabama Code § 11-49-69 to contest the purported election of Mr. Bobby Lee Harris to the office of Councilman for Ward 1 of the City of Alabaster.

Appendix C

PARTIES

1. Plaintiffs Brenda O. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon are resident citizens of the City of Alabaster, located in Shelby County, Alabama. Plaintiffs live in a subdivision known as Weatherly which is located in Shelby County. Plaintiffs are qualified voters in Shelby County, and were so on the date of contested election, August 22, 2000.

2. Defendant City of Alabaster is an Alabama municipality situated in Shelby County, Alabama.

3. Defendant Steve Rauch is sued in his official capacity and is Mayor of the City of Alabaster.

4. Defendant Bobby Lee Harris is sued in his official capacity as Ward 1 Councilman and individually. Plaintiffs contest the purported election of Mr. Harris to the office of Councilman for Ward 1 of the City of Alabaster.

FACTS

5. During the years 1994-1996, the City of Alabaster annexed several tracts of land located in the Weatherly subdivision in Shelby County. Plaintiffs are currently residents of the subject tracts which were annexed by the City of Alabaster, believed to be identified in Alabaster City Ordinances No. 94-338 and No. 96-410, and are thereby considered duly qualified electors of the City of Alabaster.

6. The City of Alabaster placed the lands which are the subject of the Weatherly annexation in Ward 1 of the City of Alabaster, for purposes of council representation.

7. On August 21, 2000 the City Council of Alabaster met in secret session, in violation of the Alabama Open Meetings Act, and agreed not to allow the votes cast in the Weatherly subdivision to be counted in the Ward One Council race or any other Council election to be held the following day.

8. On or about August 22, 2000, the City of Alabaster held a regularly scheduled election for the offices of Mayor and members of the City Council of Alabaster. The residents of the Weatherly annexed tracts were permitted to vote for the office of Mayor, but subsequently had their votes disallowed for the office of Ward 1 council member. Nor were their votes counted for any other city council member election. Ninety-three persons from the contested annexation area voted together with six absentee voters. Upon information and belief, all ninety-three persons voted for candidate Todd Goode.

9. The unofficial results, without counting the disputed ballots, indicate that defendant Bobby Lee Harris received the greatest number of counted votes in the election. If the uncounted ninety-three ballots are included in the final voting results, Mr. Harris' opponent, Todd Goode, would be the elected council member.

10. Plaintiffs further submit the annexed Affidavits of Patsy H. Cannon, Gwen Dill, John D. Harmon, and Brenda

O'Shaugnessy Singer in support of their contest of this election. Sufficient security is also submitted herewith.

GROUNDS OF CONTEST

11. The City of Alabaster and its Mayor, acting under color of law, have denied to the plaintiffs the right to vote in the Ward 1 city council election, disenfranchising them entirely from the municipal city council election. As a direct result of said denial of the right to vote, the candidate for which the plaintiffs cast their ballot has not been elected.

12. Defendants' actions constitute a denial of plaintiffs' right to vote and a denial of equal protection of laws guaranteed by the Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States and enforceable pursuant to 42 U.S.C., § 1983.

13. Defendants' actions constitute a violation of plaintiffs' rights pursuant to § 2 of the federal Voting Rights Act of 1965.

14. Plaintiff's contest is grounded statutorily upon Code of Alabama, 1975, § 11-49-69(a) (1) "Misconduct . . . on the part of any elected official, any marker, the municipal governing body or any other person" and (4) "The rejection of legal votes;"

PLEA FOR RELIEF

15. Plaintiffs petition this Court to nullify, and set aside the results of the election for Council member, Ward One, of the City of Alabaster, held on August 22, 2000.

Appendix C

16. Plaintiffs petition the Court for a writ of mandamus directing the Mayor or Clerk of the City of Alabaster (or other appropriate city official) to conduct a re-count of the votes cast in the Ward One election to the Alabaster City Council, with specific instructions to count all votes cast from the Weatherly sub-division in such re-count, and to certify the results from such re-count as official and final.

17. Plaintiffs petition the Court for a Preliminary and Permanent Injunction, pursuant to Rule 65 (a), Alabama Rules of Civil Procedure, enjoining the City of Alabaster, Alabama from filling the office of Ward One of the City Council, until this Court has full and ample opportunity to issue a ruling on the merits of this contest.

18. Plaintiffs petition the Court for an award of attorneys fees and costs as the Court finds appropriate.

RAYMOND P. FITZPATRICK, JR. (FIT001)

R. SCOTT CLARK (CLA061)

GARY L. BROWN (BRO186)

Attorneys for Plaintiffs/Contestants

Appendix C

Of Counsel
FITZPATRICK, COOPER & CLARK LLP
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

VERFICATION

The undersigned plaintiffs-contestants, being duly sworn, swear that the facts in the foregoing complaint are true and correct.

_____
Brenda O. Singer

_____
Patsy H. Cannon

_____
Gwen Dill

Sworn to and subscribed before me this 28th day of August, 2000.

_____
Notary Public
My Commission expires:_____

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen, Section 1 of the Constitution of the United States

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment Fifteen of the Constitution of the United States

Section. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section. 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence

of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard,

practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(2)

No. 01-1133

Supreme Court U.S.
FILED
MAR 28 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENDA O. SINGER, *et al.*,

Petitioners,

v.

CITY OF ALABASTER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENT BOBBY LEE HARRIS

EDWARD STILL
Counsel of Record
2101 L Street NW
Washington DC 20037-1526
(202) 785-9700

SAMUEL T. REAVES
KENNEDY COVINGTON LOBDELL & HICKMAN, LLP
100 N Tryon St., 42nd Floor
Charlotte NC 28202-4006
(704) 331-7400

BARBARA R. ARNWINE
THOMAS J. HENDERSON
LORI OUTZS BORGEN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW, Ste 400
Washington DC 20005-2124
(202) 662-8600

Counsel for Respondent Bobby Lee Harris

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

QUESTION PRESENTED

Whether the Supreme Court of Alabama correctly affirmed the dismissal of this election contest because the relief requested in the Petitioners' Complaint would violate Section 5 of the Voting Rights Act of 1965.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 8

A. No Issue of National Importance is Raised by Petitioners Because this Case is Merely an Attempt to Challenge a Particular Election Result Notwithstanding a Section 5 Objection..... 9

B. Petitioners Have Not Demonstrated That There is a Split in Authority in the Lower Courts..... 11

C. The Decision Below is Consistent with Decisions of this Court..... 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Page

CASES

Campos v. City of Houston, 968 F.2d 446 (5th Cir. 1992) 10

Chatman v. Spillers, 44 F.3d 923 (11th Cir. 1995) 10

City of Richmond v. United States, 422 U.S. 358 (1975) 6

Clark v. Roemer, 498 U.S. 953, *order modified*, 498 U.S. 954 (1990) 12

Clark v. Roemer, 500 U.S. 646 (1991) 10

Connor v. Waller, 421 U.S. 656 (1975) 11

Dotson v. City of Indianola, 514 F. Supp. 397 (N.D. Miss. 1981), *additional proceedings* at 521 F. Supp. 934 (N.D. Miss. 1981) (three-judge court), *aff'd*, 456 U.S. 1002 (1982) 12

Hathorn v. Lovorn, 457 U.S. 255 (1982) 11

Hubbard v. City of Grenada, No. 96-172, 1998 WL 527084 (N.D. Miss., July 1, 1998) 12

Lopez v. Monterey County, 519 U.S. 9 (1996) 11, 12

United States v. Louisiana, 952 F. Supp. 1151 (W.D. La.) (three-judge court), *aff'd*, 521 U.S. 1101 (1997) 12

STATUTES

Ala. Code § 11-46-20(a) 4

Ala. Code § 11-46-21(a) 4

Ala. Code § 11-46-69 2

TABLE OF AUTHORITIES – Continued

Page

Ala. Code § 11-46-70 9

Ala. Code § 17-15-6 9

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c..... *passim*

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973..... 3

RULES

Rules of the Supreme Court, Rule 10(b).....11

BRIEF IN OPPOSITION FOR RESPONDENT BOBBY LEE HARRIS

Respondent Bobby Lee Harris ("Harris") submits that the petition for writ of certiorari filed by Petitioners Brenda O. Singer, et al. ("Petitioners") should be denied. The decisions below, by the Supreme Court of Alabama and the Circuit Court for Shelby County, Alabama, correctly applied Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Section 5") and correctly held that Section 5 requires dismissal of Petitioners' claims.

STATEMENT OF THE CASE

A. Proceedings Below.

A regularly scheduled municipal election of the City of Alabaster, Alabama ("the City") was held on August 22, 2000. In one of the races that was part of this election, Harris was reelected to the Alabaster City Council as councilman for Ward 1, the only majority-black ward of the City's seven council wards. Harris was at the time of the election and is now the only black member of the City Council.

On August 28, 2000, Petitioners filed a Complaint and Statement to Contest Municipal Election (the "Complaint") in Alabama state court with respect to Harris' election. Petitioners are residents who were brought into the City by annexation before the August 22 election. Prior to the election, the City assigned Petitioners, along with other annexed residents in their subdivision, to vote in Ward 1 for council election purposes. However, the United States Attorney General (the "Attorney General")

objected to this ward designation pursuant to Section 5 of the Voting Rights Act of 1965. Under Section 5, which is designed to prevent racial discrimination in voting practices, voting changes (such as ward designations) in covered jurisdictions must receive federal approval (known as preclearance) from the Attorney General or the United States District Court for the District of Columbia before such changes can be given legal effect.

The basis for the Attorney General's objection in this instance was that assigning these residents, nearly all of whom are white, to Ward 1 would change Ward 1 to a majority-white ward and would dilute the black vote in the only majority-black ward in the City. In light of the Attorney General's objection, the City was prohibited by federal law from counting, and did not count, the votes of the annexed residents toward the official vote totals in the Ward 1 race.[1]

Petitioners alleged in the Complaint that their votes, along with the votes of other annexed residents in their subdivision, were unlawfully excluded from this election, and that Harris' election opponent (who is white) would have prevailed if these votes had been counted in the Ward 1 race. The Complaint, naming Harris, the City, and the City's mayor as defendants, asserted the following grounds for contesting Harris' election: (1) Section 11-46-69 of the Code of Alabama, 1975, which provides that an election may be set aside because of the "misconduct" of elected officials or "[t]he rejection of legal

---

[1] In their certiorari petition, Petitioners have thus mischaracterized their status as "qualified" voters in the Ward 1 race.

votes"; (2) denial of equal protection and of the right to vote under the United States and Alabama Constitutions; and (3) Section 2 of the Voting Rights Act of 1965. Petition at 24a.

Despite Petitioners' efforts in their certiorari petition to portray their Complaint as a global challenge to the entire City election which was held on August 22, 2000, the *only* relief requested in the Complaint, other than a request for costs and attorneys' fees, relates *solely* to the Ward 1 council seat race. Specifically, the Complaint asks the court to (1) "nullify, and set aside the results of the election *for Council member, Ward One. . . .* "; (2) issue a "writ of mandamus directing the Mayor and Clerk of the City of Alabaster . . . to conduct a re-count of the votes cast *in the Ward One election* . . . [and] count all votes cast from the [annexed residents'] sub-division. . . . "; and (3) issue a "Preliminary and Permanent Injunction . . . enjoining the City . . . from filling *the office of Ward One. . . .* " Petition at 24a-25a (emphasis added). Petitioners requested no relief with respect to the other six council wards from which they were also excluded.

Harris and the other Respondents moved to dismiss the Complaint because the relief sought would have the effect of assigning the Weatherly voters to Ward 1 – exactly the action the Attorney General's objection had prohibited. The United States, as *amicus curiae*, also argued for dismissal on this basis. The trial court granted the motions to dismiss, correctly concluding that "[t]he relief sought by the plaintiffs in this cause . . . would only be available through disregarding the clearly established federal law." Petition at 19a. On appeal, the Alabama

Supreme Court affirmed the trial court, similarly concluding that "we are unable to afford the plaintiffs the relief they request without doing violence to § 5." Petition at 10a.

B. Facts.

According to the 1990 Census, the City had a total population of 14,732 persons, of whom 1,617 (11%) were black. The City is governed by a mayor, who is elected city-wide, and a seven-member city council, with one member of the council elected from each of seven wards. This mayor-council form of government, as well as the districting plan used to elect members of the city council, were precleared by the Attorney General in 1991. Under the 1991 precleared districting plan, Ward 1 had a majority-black population, while the other six council wards had populations in which the vast majority of voters were white.

Alabama law requires the City to hold mayoral and city council elections every four years (in presidential election years) on the fourth Tuesday in August. Ala. Code § 11-46-20(a) and § 11-46-21(a). The election at issue was a regularly scheduled election.

The City has experienced substantial growth during the past decade. Between 1992 and 2000, the City adopted 58 new annexations and one de-annexation. The City designated each of the annexations to existing council wards. Of these annexations, 42 were residential and 16 were commercial. Two of the residential annexations, which took place in the Weatherly subdivision in 1994

and 1996, are at issue in the present case. Petitioners live in these annexed Weatherly areas.

On or about May 30, 2000, pursuant to Section 5 and the regulations promulgated thereunder, the City submitted for review by the Attorney General the 58 annexations, the designation of all the annexations to various council wards, and the de-annexation. In July of 2000, the Attorney General precleared the 16 commercial annexations, along with their designations to council wards, precleared the de-annexation, and requested additional information regarding the remaining 42 residential annexations. In light of the impending August 22 municipal election, the City asked the Attorney General to expedite the decision on the remaining annexations.

By letter dated August 16, 2000 (six days before the scheduled election), the Attorney General precleared 40 of the residential annexations, along with the City's designation of the annexations to wards. The Attorney General also precleared the two Weatherly annexations at issue. However, the Attorney General objected to the designation of these two annexations to Ward 1. Noting that the inclusion of the annexed residents in Ward 1 would change the City's only majority-black ward to majority-white, the Attorney General stated that "it appears that the retrogression caused by the proposed Ward 1 annexations would seriously threaten, if not eliminate, the only opportunity minority voters currently have to elect candidates of their choice to city office." The Attorney General's letter stated:

> Where an annexation significantly decreases minority voting strength, the reasons for the annexation must be objectively verifiable, and

> legitimate, and the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community. *City of Richmond v. United States*, 422 U.S. 358 at 371-73 (1975). Here the designation of these annexations to Ward 1 is likely to result in the elimination of representation for a minority community. . . .
>
> Thus, the city has not carried its burden of showing that the post-annexation election system will fairly reflect the post-annexation strength of the minority community. . . . The city has proffered few reasons for its refusal to ameliorate the retrogressive impact of the proposed Ward 1 annexations. . . .

This letter further instructed the City in no uncertain terms that the votes of the annexed Weatherly residents could *not* be counted toward the Ward 1 vote totals in the upcoming election:

> [U]ntil the objection is withdrawn or a judgment from the District of Columbia Court [preclearing the change] is obtained, the objection by the Attorney General remains in effect and the designation of Ordinance Nos. 94-338 and 96-410 [i.e., the Weatherly annexations] to Council Ward 1 continue to be legally unenforceable. Therefore, residents of the areas annexed by Ordinance Nos. 94-338 and 96-410 may vote for the mayoral position in the upcoming [August 22] election but may not vote in the Ward 1 city council race.

In a response letter dated August 17, 2000, the City informed the Attorney General that the City would

comply with the Attorney General's instructions by using the following procedure:

> Pursuant to the letter, persons living in the two Weatherly annexed areas will be allowed to vote in the mayoral races, but will not be allowed to participate or cast officially counted votes in the Ward 1 council race. The Ward 1 council vote will be legally certified without consideration of votes of persons living in the two Weatherly annexed areas.

The City held the election as scheduled on August 22. In accord with the Attorney General's objection and the City's plan to comply with this objection, the City allowed residents in the Weatherly annexation to cast votes for mayor. Because the election ballots had already been printed, the ballots used in Weatherly also reflected the Ward 1 council race. However, the City kept the ballots cast in Weatherly separate from the other ballots to ensure that the votes of these residents would not be counted in the official vote totals for the Ward 1 council race.

In this election, there were 103 ballots cast in Weatherly. All of these ballots reflected votes for mayor, and these votes were certified as part of the official totals in the mayoral election. On 101 of these ballots, voters also attempted to cast votes in the Ward 1 race. Harris stipulates that all of these 101 votes were cast for Harris' opponent, Todd Goode ("Goode").

Harris was certified as the winner of the Ward 1 council seat race. Without including the 101 attempted votes of the annexed Weatherly residents, there were 613 votes cast in the Ward 1 race. Of these, 326 (53.18%) were

cast for Harris, while 287 (46.82%) were cast for Goode. Therefore, if the Attorney General had not objected, and the 101 ballots cast by the annexed Weatherly residents were counted toward the official totals in that race, Goode would have prevailed.

REASONS FOR DENYING THE WRIT

This Case Involves the Application of Well-Established Law Under Section 5 of the Voting Rights Act and Does Not Merit a Grant of Certiorari.

This garden-variety election contest case does not warrant certiorari review by this Court. There is no split in authority among the circuits or the state courts of last resort in terms of the applicable law, nor is there a conflict with Supreme Court precedent. Rather, the courts below correctly applied clearly-established precedent from this Court in dismissing Petitioners' claims under Section 5. In this case, the Attorney General objected to the designation of annexed residents to Ward 1. The courts below have no authority to review the Attorney General's objection, and are forbidden from granting any relief which would contravene this objection by giving effect to the Ward 1 designation. Thus, the lower courts had no jurisdiction to grant the relief requested in the Complaint, which is merely an election contest that seeks to have the votes of the annexed residents included in the Ward 1 race and to have Harris' challenger declared the winner of that race. Accordingly, the Complaint of Petitioners was properly dismissed.

A. No Issue of National Importance is Raised by Petitioners Because this Case is Merely an Attempt to Challenge a Particular Election Result Notwithstanding a Section 5 Objection.

Petitioners have attempted to characterize their lawsuit as a constitutional challenge to their exclusion from the entire council election which was held by the City on August 22, 2000. However, this characterization simply ignores Petitioners' Complaint.

The *only* relief actually requested in the Complaint relates *not* to the city council election in general, but to the Ward 1 race in particular. Petitioners' Complaint requested only that the Ward 1 race be nullified, that the votes of the annexed residents be certified as legal votes in the Ward 1 race, and that Harris be enjoined from taking office as Ward 1 council member pending a ruling on the merits. Petition at 24a-25a. This suggests that Petitioners' lawsuit is merely a statutory election contest of the Ward 1 race. *See* Ala. Code § 11-46-70 (relief available in an election contest is limited to deciding who among the candidates received the most legal votes, declaring that person the winner, and declaring a runoff if there is a tie); Ala. Code. § 17-15-6 (court hearing election contest may not exercise equitable powers).[2]

---

[2] Petitioners now argue that their case should not have been dismissed because the City could have obtained a "delay in the election" which "would have preserved the right of all individuals to vote." Petition at 14. Since the Petitioners did not pray that the Alabama trial court delay the election, they have waived this relief.

Had Petitioners filed their Complaint in federal court rather than state court, additional remedies may have been available to

If Petitioners were truly complaining of their unconstitutional exclusion from the entire city council election, they would have made some request for relief regarding the other six council wards besides Ward 1 from which they were *equally* excluded. Only those voters who are qualified under law may vote in a particular election. Petitioners certainly had no right to vote in Ward 1 as opposed to other wards, especially given the Attorney General's specific objection to the Ward 1 designation based on the potential for racial discrimination. Since Petitioners have requested no relief other than statutory election contest relief with respect to the Ward 1 race, they have not sufficiently stated any claim relating to their exclusion from the city council election as a whole and have not stated an issue that merits a grant of certiorari.

---

them. *See, e.g., Chatman v. Spillers*, 44 F.3d 923, 925 (11th Cir. 1995) (federal district court "has the power to order interim or special elections" even where plan has been precleared only in part) (citing *Clark v. Roemer*, 500 U.S. 646 (1991), and *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992)). The lack of relief to Petitioners is based on (1) their choice of forum – state court rather than federal court, and (2) their choice of remedies. The Alabama Supreme Court held it was without jurisdiction to order either relief because both would violate Section 5. This case does not present an issue of national importance that should be resolved by the Court regarding a conflict between individual voting rights and a municipality's obligations under Section 5 of the Voting Rights Act; rather, it is a case about the limitations inherent in Petitioners' choice to bring their case as an election contest in state court.

B. Petitioners Have Not Demonstrated That There is a Split in Authority in the Lower Courts.

The rules of this Court provide that an important consideration in determining whether to grant certiorari is that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b), Rules of the Supreme Court of the United States. The Petitioners have pointed to no split in the circuits or the state supreme courts over how to handle situations such as the present one.

C. The Decision Below is Consistent with Decisions of this Court.

It is black letter law that voting changes which have not been precleared under Section 5 cannot be implemented. The application of Section 5 in this regard is set forth in this Court's unanimous decisions in *Lopez v. Monterey County*, 519 U.S. 9 (1996), and *Clark v. Roemer*, 500 U.S. 646 (1991). "A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change." *Lopez*, 519 U.S. at 20. "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods." *Clark*, 500 U.S. at 652 (quoting *Connor v. Waller*, 421 U.S. 656 (1975)). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.' " *Clark*, 500 U.S. at 652 (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)).

This Court has repeatedly affirmed orders of three-judge federal district courts which permit elections to go forward as to precleared changes but which enjoin those elections as to changes which have not been precleared. Even though this result causes different treatment of voters living in a single jurisdiction, this Court has never suggested an equal protection violation in these instances. *See Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981) (three-judge court), *additional proceedings* at 521 F. Supp. 934, 943-44 (N.D. Miss. 1981) (three-judge court), *aff'd*, 456 U.S. 1002 (1982) (ordered elections to "proceed as scheduled," allowing all electors within pre-annexation city limits and three precleared areas to vote, but "precluding from voting or running for office only those electors residing in the [objected-to] annexation"); *Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (unprecleared changes could not be given effect even though this "would leave the County without a judicial election system"); *Hubbard v. City of Grenada*, No. 96-172, 1998 WL 527084 (N.D. Miss., July 1, 1998) (three-judge court), *aff'd*, 525 U.S. 1038 (1998) (city must conduct elections under last precleared districting plan, excluding voters in unprecleared annexed area); *Clark v. Roemer*, 498 U.S. 953, *order modified*, 498 U.S. 954 (1990) (judicial elections allowed only in precleared districts); *United States v. Louisiana*, 952 F. Supp. 1151, 1179 (W.D. La.) (three-judge court), *aff'd*, 521 U.S. 1101 (1997) (city residents allowed to vote for city council but not unprecleared city court positions).

These cases show that the City properly proceeded with the August 22, 2000 election as to precleared changes but not as to unprecleared changes. The City

submitted 58 annexations for preclearance in July of 2000 – and 56 of the 58 annexations, along with their ward designations, were in fact precleared before the election. On August 16, 2000, six days before the election, the Attorney General objected to the ward designations of the remaining 2 annexations which are at issue. Faced with this objection, the City could not have simply counted the votes of the annexed Weatherly residents in the Ward 1 race, as this would have meant ignoring the Attorney General's objection and illegally implementing unprecleared changes. The City also could not have delayed the election or assigned the annexed residents to another ward without having first obtained preclearance of these changes. In short, in order to comply with Section 5, the City had no other option except to allow the election to proceed as it did. Because the City acted in compliance with the precedents of this Court, there is no basis for granting a writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD STILL
Counsel of Record
2101 L Street NW
Washington DC 20037-1526
(202) 785-9700

SAMUEL T. REAVES
KENNEDY COVINGTON LOBDELL & HICKMAN, LLP
100 N Tryon St., 42nd Floor
Charlotte NC 28202-4006
(704) 331-7400

BARBARA R. ARNWINE
THOMAS J. HENDERSON
LORI OUTZS BORGEN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW, Ste 400
Washington DC 20005-2124
(202) 662-8600

Counsel for Respondent
Bobby Lee Harris

Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(3)

No. 01-1133

IN THE

Supreme Court of the United States

BRENDA O. SINGER, *et al.*,

Petitioners,

v.

CITY OF ALABASTER, ALABAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

CITY OF ALABASTER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. FRANK HEAD
WALLACE, ELLIS, FOWLER & HEAD
Attorney for Respondent
P.O. Box 587
Columbiana, Alabama 35051
(205) 669-6783

4988

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CITY OF ALABASTER, ALABAMA COULD PERMIT THE PETITIONERS TO VOTE IN THE CITY'S WARD 1 COUNCIL ELECTION WITHOUT HAVING RECEIVED PRECLEARANCE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, AND PARTICULARLY, WHERE THE UNITED STATES ATTORNEY GENERAL EXPRESSLY OBJECTED TO THE PETITIONERS' PARTICIPATION IN SAID ELECTION.

II. WHETHER THE SUPREME COURT OF ALABAMA VIOLATED FEDERAL LAW IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONERS' LAWSUIT.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES vi

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

A. Material Facts. 1

B. Proceedings in Lower Courts 3

ARGUMENT 6

I. THE CITY OF ALABASTER, ALABAMA COULD NOT PERMIT THE PETITIONERS TO VOTE IN THE CITY'S WARD 1 COUNCIL ELECTION WITHOUT HAVING RECEIVED PRECLEARANCE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, AND PARTICULARLY, WHERE THE UNITED STATES ATTORNEY GENERAL EXPRESSLY OBJECTED TO THE PETITIONERS' PARTICIPATION IN SAID ELECTION.
..... 6

Page

II. THE SUPREME COURT OF ALABAMA DID NOT VIOLATE FEDERAL LAW IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONERS' LAWSUIT. 16

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Cases	Page
Allen v. State Board of Elections, 393 U.S. 544, 89 S. Ct. 817 (1969)	11
Chadwick v. Town of Hammondville, 270 Ala. 618, 120 So. 2d 899 (1960)	15
City of Pleasant Grove v. United States, 479 U. S. 462, 107 S. Ct. 794, 93 L. Ed 2d 866 (1987)	12,15
City of Prichard v. Moulton, 277 Ala. 231, 168 So. 2d 602 (1964)	15
Clark v. Roemer, 500 U. S. 646, 111 S. Ct. 2096, 114 L. Ed 2d 641 (1991)	7,9,10
Dennis v. Pendley, 518 So. 2d 688 (Ala. 1987)	10
Georgia v. United States, 411 U. S. 521, 93 S. Ct. 1702, 36 L. Ed 2d 472 (1973)	12
Griggs v. Bennett, 710 So. 2d 411, 412, n. 3 (Ala. 1998)	10
Hathorn v. Lovorn, 457 U. S. 255, 102 S. Ct. 2421, 72 L. Ed 2d 824 (1982)	13
Lopez v. Monterey County, California, 519 U. S. 9, 117 S. Ct. 340, 136 L. Ed 2d 273 (1996)	7,8,9,10,11,13

Page

Mitchell v. City of Prichard,
538 So. 2d 1 (Ala. 1988) 10

NAACP v. Hampton County Election Commission,
470 U.S . 166, 105 S. Ct. 1128 (1985) 11,15

Perkins v. Matthews,
400 U. S. 379, 91 S. Ct. 431 (1971) 12

United States v. Board of Commissioners of
Sheffield, Alabama,
435 U. S. 110, 98 S. Ct. 965,
55 L. Ed. 2d 148 (1978) 6,15,17

Reno v. Bossier Parish School Board,
520 U. S. 471, 117 S. Ct. 1491,
137 L. Ed 2d 730 (1997) 17

Constitution, Statutes and Rules:

Alabama Code 1975, Section 11-46-21 13,17

Alabama Code 1975, Section 11-46-140 3

Alabama Rules of Civil Procedure, 41(2) 17

Rules of the Supreme Court of the United States,
10(b) and (c) 1

Section 5 of the Voting Rights Act of 1965,
42 U.S.C. § 1973c 1,4,5,6,12

United States Constitution, Article VI 13

TABLE OF APPENDICES

Page

Appendix A -- Opinion of the Supreme Court of Alabama released November 9, 2001 . . . . . 1a

Appendix B -- Order of the Circuit Court of Shelby County dated September 22, 2000 . . . . . 20a

STATEMENT OF JURISDICTION

The Supreme Court of Alabama followed well-established federal precedent in recognizing the mandates of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and declining subject-matter jurisdiction of a voting change that had not received preclearance. Rule 10(b) and (c) of the Rules of the Supreme Court of the United States direct that the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Material Facts.

The City of Alabaster, a municipal corporation located in Shelby County, Alabama, conducted its regularly scheduled municipal elections on August 22, 2000, along with other municipalities in Alabama.

Prior to the elections, the City requested administrative preclearance from the United States Attorney General for a number of parcels of property the City had previously annexed. On July 10, 2000, the Attorney General granted preclearance to sixteen (16) annexations and one (l) deannexation, but objected to forty-two (42) annexations. C. 24-27, 36-39. On August 16, 2000, the Attorney General granted

unrestricted preclearance to forty (40) of the annexations, but granted preclearance with right to participate in only the mayoral election for two (2) other annexed areas lying in the Weatherly Subdivision, wherein the petitioners reside. C.28-32, 40-44. The Attorney General expressly objected to persons living in these two areas from participating in the Ward 1 council election, as had been sought by the City, due to concerns that the voting change might have an unlawful retrogressive discriminatory effect on minority citizens. C.28-32, 40-44.

With the municipal elections at hand and the ballots printed, the City proposed allowing the affected Weatherly residents vote at a separate machine so that their mayoral votes could be counted, and their preference for Ward 1 council member could be recorded in the event of a contest, challenge, or appeal; the City advised that it would not (and could not) certify the results as to the Weatherly residents' vote in the council election, at least without some appropriate court order. C. 81-82. Respondent Bobby Lee Harris, an African-American candidate, received the most legal, certified votes in the Ward 1 council election, but less total votes than his white opponent if the unofficial ballots of the affected Weatherly residents were allowed. Resp. App. 4a-5a; C.4-5, 21.

Respondent Bobby Lee Harris was declared and certified as the winner of the Ward 1 council election.

The petitioners also allege that the City council met in secret session prior to the election, in violation of the Alabama Open Meetings law, but this allegation was denied in the Answer as being absolutely untrue. C. 72. This issue was never raised at the trial court motion hearing, and no significant argument has been made concerning this contention in the petitioners' appellate briefs.

B. Proceedings in Lower Courts.

The petitioners filed a Complaint and Statement to Contest Municipal Election with the Circuit Court of Shelby County on August 28, 2000. C. 3-15. The Complaint alleged that the City of Alabaster wrongly failed to count certain votes in the August 22, 2000, Ward 1 council election, which were cast by persons in two annexed areas of the Weatherly Subdivision. The petitioners claimed the City rejected legal votes and disenfranchised the said affected voters, and claimed various statutory and constitutional violations. The petitioners also filed affidavits contesting the election on the basis of, Section 11-46-140(a)(4), Ala. Code 1975. C. 10-15. The Complaint sought to have the Circuit Court

compel the City to recount the votes, and re-certify the Ward 1 council election using the contested votes, and also enjoin the certified winner, respondent Bobby Lee Harris, from taking office.

The City of Alabaster, Alabama, and Steve Rauch, in his official capacity as Mayor, filed an Answer and Motion to Dismiss on September 8, 2000. C.21-44. The City and Mayor Rauch responded that those persons casting the contested votes lived in an area of the City that had not received appropriate preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and the City was precluded by federal law from counting the said votes. The said respondents submitted copies of two letters from the United States Department of Justice dated July 10, 2000, and August 16, 2000, wherein the United States Attorney General objected to the City's request to authorize the practice sought by the petitioners, i.e., allowing persons residing in the two Weatherly areas to vote in the Ward 1 council election. C.24-32, 36-44. The respondents denied that the Circuit Court had jurisdiction to decide this issue.

Respondent Bobby Lee Harris, the certified winner of the Ward 1 council election, also filed an Answer with motion to dismiss therein, on September 11, 2000. A Motion and Memorandum of Law was filed

by the United States Attorney General seeking to participate as Amicus Curiae on September 18, 2000. The Circuit Court granted the motion of the Attorney General. C.109.

The Circuit Court of Shelby County conducted a hearing on the motions to dismiss on September 18, 2000, with counsel for all parties present, including counsel for the United States Attorney General. On September 22, 2000, the Circuit Court entered an order granting the respondents' motions to dismiss. C.109-111. The trial court determined that the relief sought by the petitioners would violate clearly established federal law, and noted that the Alabama Supreme Court had recognized such. Resp. App. 17a-19a. The petitioners filed their state court Notice of Appeal on October 5, 2000.

The Supreme Court of Alabama affirmed the order of dismissal on November 9, 2001 on the basis of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and the many U. S. Supreme Court and federal appellate decisions interpreting such. Resp. App. 1a-16a. The petitioners then filed their Petition for Writ of Certiorari with this Court.

ARGUMENT

I. THE CITY OF ALABASTER COULD NOT PERMIT THE PETITIONERS TO VOTE IN THE WARD 1 COUNCIL ELECTION WITHOUT RECEIVING PRECLEARANCE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, AND PARTICULARLY, WHERE THE UNITED STATES ATTORNEY GENERAL EXPRESSLY OBJECTED TO THE PETITIONERS' PARTICIPATION IN SAID ELECTION.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, requires that all applicable jurisdictions receive preclearance from the United States Attorney General or the United States District Court for the District of Columbia before enacting any voting change. In United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978), the United States Supreme Court recognized that municipalities and political subdivisions in the State of Alabama, which include the City of Alabaster, are subject to the mandates of Section 5.

The U. S. Supreme Court has emphatically declared that "a jurisdiction subject to Section 5's requirements must either attain judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has

succeeded in obtaining preclearance." Lopez v. Monterey County, California, 519 U.S. 9, 20, 117 S. Ct. 340, 347, 136 L. Ed 2d 273 (1996); Clark v. Roemer, 500 U.S. 646, 648-649, 111 S. Ct. 2096, 2101, 114 L. Ed 2d 641 (1991). "If a voting change subject to Section 5 has not been precleared, Section 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." Lopez, 519 U. S. at 20, 117 S. Ct. At 347.

The Supreme Court further recognized that "Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process. Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court of the District of Columbia." Lopez, 519 U.S. at 23, 117 S. Ct. at 348.

The United States Supreme Court has made clear that preclearance must be obtained regardless of the complications, or effect on voting of persons within the affected areas. A voting change simply cannot be implemented by a covered jurisdiction unless Section 5 preclearance is received.

In Lopez vs. Monterey County, California, supra, the Court ruled that the district court should not have ordered an unprecleared at-large election, despite concerns that an injunction would leave the county without an election system. Monterey County had organized its municipal and non-municipal court districts in accordance with a number of state constitutional and statutory enactments over a period of years between 1972 and 1983. Elections were held during those years, as well as through 1990, but the county never submitted any of its consolidated ordinances for preclearance. Lopez, 519 U. S. at 13, 117 S. Ct. at 344. Litigation ensued between Hispanic plaintiffs, and the County and State, with concerted efforts at settlement, and attempts by the County to amend the State Constitution in ways that would not conflict with the Voting Rights Act. The District Court ordered the County to conduct elections under an unprecleared, election plan, apparently pursuant to its remedial equitable authority. Lopez, 519 U. S. at 15-17,21, 117 S. Ct. at 345-346, 448.

The Supreme Court reviewed the matter and acknowledged that there might be no way for the County to go back to the 1968 plan, and further recognized that enjoining the election could possibly leave the

County without any judicial election system. The Court noted that the parties seemed unable to fashion an election plan that did not violate the California Constitution, and the State had vigorously opposed all of the proposals as violative of State law. Lopez, 519 U.S. at 22-23, 117 S. Ct. at 348. Nonetheless, the Court declared that compliance with Section 5 was mandatory, and Monterey County must obtain preclearance from the Attorney General or District Court of the District of Columbia before the voting changes could be implemented.

In Clark v. Roemer, 500 U.S. 646, 111 S. Ct. 2096, 114 L. Ed 2d 691 (1991), suit was filed challenging the validity of Louisiana's multi member at-large electoral scheme for a number of appellate, district and family court judges. A federal district court in Louisiana entered an order authorizing elections to proceed for judgeships which had not received preclearance. The United States Supreme Court reversed and ordered that the preclearance requirements of Section 5 be observed. The Court stated that "Congress required each jurisdiction subject to Section 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes." Clark, 500 U.S. at 658, 111 S. Ct. at 2104. The Court observed that Louisiana's

predicament was not such an exigency as to invoke equitable principles justifying the election to proceed. Clark, 500 U.S. at 654-655, 111 S. Ct. at 2102. See also Lopez, 519 U.S. at 21-22, 117 S. Ct. at 348.

The Alabama Supreme Court likewise has acknowledged that "Section 5 of the Voting Rights Act of 1965, requires that states covered by the Act obtain prior clearance before proposed changes can be put into effect." Dennis v. Pendley, 518 So. 2d 688 (Ala. 1987); Griggs v. Bennett, 710 So. 2d 411, 412, n. 3 (Ala. 1998). The Alabama Supreme Court has recognized that "cases involving the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal courts." Mitchell v. City of Prichard, 538 So. 2d 1, 2 (Ala. 1988).

In this case, the Alabama Supreme Court reaffirmed the exclusive federal jurisdiction of the preclearance requirements of Section 5. Resp. App. 6a. The Court noted that the U. S. Attorney General had objected to the City's inclusion in Ward 1 of the areas where the petitioners live. Consequently, authorizing a recount to include the votes of persons residing in the unprecleared areas, e.g., the petitioners, would necessarily contravene the Attorney General's objection, which is

precisely something Section 5 permits only federal courts to do. Resp. App. 9a. The Court reasoned that it could not authorize the requested relief.

The Alabama Supreme Court also opined that it could not nullify the election and delay a second vote because that also involved the application of Section 5. Resp. App. 9a-11a. The Court cited Allen v. State Board of Elections, 393 U. S. 544, 565-566, 89 S. Ct. 817 (1969), and NAACP v. Hampton County Election Commission, 470 U. S. 166, 105 S. Ct. 1128 (1985). The latter case specifically held that changes regarding the date of an election require preclearance. Hampton County, 470 U. S. at 178-179, 181-183, 105 S. Ct. at 1135, 1137-1138. As stated therein, "Appellees' use of an August filing period in conjunction with a March election, and the setting of the March election date itself, were changes that should have been submitted to the Attorney General under § 5." Hampton County, 470 U.S. at 182, 105 S. Ct. at 1137.

The petitioners nonetheless contend that they have an absolute right to vote in municipal elections despite the fact that preclearance has not been granted in this matter. They contend they had legal votes which were not counted. The petitioners are simply wrong. The petitioners were

not legal voters for this election because the appropriate federal authorities had not authorized preclearance pursuant to Section 5.

The City's annexation of residential property changed the boundaries and population of its existing wards, and the City in general. Increasing the number of people and geographical area of the municipality implicates Section 5. Pursuant to 42 U.S.C. § 1973c, and clearly defined U. S. Supreme Court decisions, jurisdictions covered by the requirements of Section 5 may not legally enact any change in voting practice unless and until they receive the requisite preclearance. This rule is straight-forward. The U. S. Supreme Court has definitively held that annexations are covered by Section 5. Perkins v. Matthews, 400 U.S. 379, 388-389, 91 S. Ct. 431, 437 (1971); City of Pleasant Grove v. United States, 479 U.S. 462, 467-468, 107 S. Ct. 794, 798, 93 L. Ed 2d 866 (1987). The Court has also held that changes in the boundaries of election districts are covered by Section 5. Georgia v. United States, 411 U. S. 521, 531-532, 93 S. Ct. 1702, 1706, 36 L. Ed 2d 472 (1973). It is undisputed that the requirements of Section 5 are constitutional.

In the event the City of Alabaster had allowed the certification of the contested votes, without receiving preclearance, the United States or

adversely affected private plaintiffs could have immediately brought an enforcement action and obtained an injunction. Section 5 plaintiffs are entitled to an injunction prohibiting implementation of a voting change that has not been precleared. Lopez, 519 U.S. at 20, 117 S. Ct. at 347. Further, under the Supremacy Clause of the U. S. Constitution, Article VI, clause 2, state courts lack jurisdiction to grant relief which would circumvent the preclearance requirements of Section 5. Hathorn v. Lovorn, 457 U. S. 255, 269-270, 102 S. Ct. 2421, 2430, 72 L. Ed 2d 824 (1982).

If the trial court had for some reason enjoined the winning candidate, Bobby Lee Harris, from taking office, and ordered a new Ward 1 council election, the petitioners would still not be able to vote in the election. The petitioners cannot affect the Ward 1 election, which is the relief they seek, and consequently, no benefit would be gained by the petitioners from respondent Harris being enjoined from taking office. The same pool of people would still vote in a new Ward 1 election.

Pursuant to Section 11-46-21, Ala. Code 1975, the City held its municipal elections on the fourth Tuesday in August, 2000, in

accordance with the statutory authority for such. The City could not certify illegal votes cast by those persons living in the two annexed areas which were subject to the Attorney General's August 16, 2000 objection. The City had no choice but to comply with federal law under Section 5, and the Attorney General's objection. If the City had permitted the petitioners and similarly situated persons to vote in the August 22 election, and thereby attempted to effect the voting changes despite the Attorney General's objection, a successful Section 5 enforcement or injunction suit would likely have been brought in federal court.

The petitioners argue that the election could have been postponed for an indefinite period of time until the Attorney General finally conceded and approved the City's request for them and others to become a part of Ward 1. The Attorney General made absolutely clear, however, that inclusion of the contested voters would cause an unlawful retrogressive discriminatory effect in the opinion of said office, and from the City's first-hand involvement in the matter, any change in the Attorney General's position was not going to occur. The litigation alternative available in the District Court of Columbia often takes years to conclude in these type cases, and given the circumstances, the City

would inevitably fail in a quixotic pursuit at extreme financial cost. The Supreme Court has ruled that the Attorney General's interpretation of the Voting Rights Act is entitled to considerable deference. Board of Commissioners of Sheffield, 435 U.S. at 131, 98 S. Ct. at 979; Hampton County, 470 U.S. at 178-179, 105 S. Ct at 1135; City of Pleasant Grove, 479 U.S. at 468, 107 S. Ct. at 798. There might never be an election if the petitioners' suggested course were followed.

The City acted responsibly in holding the regularly scheduled election pursuant to State law. The City will certainly assign the petitioners to a council ward, perhaps a redefined Ward 1, as soon as the 2000 census figures are completed and a suitable plan is accepted by the Attorney General. Although the petitioners demand voting participation in the presently configured Ward 1, the City made extensive efforts to have such approved, and considering the facts and obstacles, it is evident that such would not have occurred. It is presumed that a municipality exercises its authority in a proper and legal manner, Chadwick v. Town of Hammondville, 270 Ala. 618, 120 So. 2d 899 (1960), and courts will not review the wisdom or advisability of discretionary acts vested in the governing body. City of Prichard v. Moulton, 277 Ala. 231, 168 So. 2d

602 (1964).

Thus, the petitioners did not have the right to vote in the recent city council election without the U. S. Attorney General having granted preclearance of the voting change, and the election was properly conducted by the City.

II. THE SUPREME COURT OF ALABAMA DID NOT VIOLATE FEDERAL LAW IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONERS' LAWSUIT.

As previously shown herein, federal law is absolutely clear that the City of Alabaster could not permit the petitioners to vote in the August 22, 2000 council election. The U.S. Attorney General objected to the City's submission, and preclearance approval is required before a voting change is legally permissible. The trial Court could not grant the relief sought by the petitioners in their prayer for relief. The trial Court could not nullify the election results and order a recount to include unprecleared Weatherly voters. The votes of the unprecleared Weatherly voters would not be "legal votes" for the City, or the Court, to consider.

Persons living in unprecleared areas do not have a right to vote in the applicable political subdivision of jurisdictions to which the

Voting Rights Act applies until preclearance is granted, i.e., unless either the U.S. Attorney General or the District Court for the District of Columbia concludes that the proposed voting changes are non-discriminatory in intent and effect. The Voting Rights Act, and the interpretation thereof by the United States Supreme Court, freezes each covered jurisdiction's election procedures until the applicable federal instrumentality determines the change will be non-discriminatory. Board of Commissioners of Sheffield, 435 U. S. at 121, 98 S. Ct. at 974; Reno v. Bossier Parish School Board, 520 U. S. 471, 477-478, 117 S. Ct. 1494, 1497, 137 L. Ed 2d 730 (1997). There have been no federal or state law violations. There obviously would have been federal and state violations if the City (l) had not complied with the Section 11-46-21 (a), Ala. Code 1975, and not held the election, and instead simply perpetuated the terms of the incumbents by further challenging the Attorney General's decision when the likelihood of success was extremely remote, or (2) had allowed the petitioners to vote without preclearance.

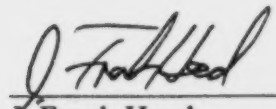
The Circuit Court was justified in exercising Rule 41 (2) of the Alabama Rules of Civil Procedure to dismiss the case. The Supreme Court of Alabama correctly affirmed the trial court's ruling in its

interpretation of federal law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



J. Frank Head
Attorney for Respondent,
City of Alabaster, Alabama
WALLACE, ELLIS, FOWLER & HEAD
P.O. Box 587
Columbiana, AL 35051
Telephone: (205) 669-6783

APPENDIX A -- OPINION OF THE SUPREME

COURT OF ALABAMA RELEASED

NOVEMBER 9, 2001

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1000093

Brenda 0. Singer et al.

v.

City of Alabaster et al.

Appeal from Shelby Circuit Court
(CV-00-850)

BROWN, Justice.

Brenda 0. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon (collectively referred to herein as "the plaintiffs") appeal from the Shelby Circuit Court's dismissal of their lawsuit contesting the

results of the August 22, 2000, municipal election for the position of Ward 1 council member for the City of Alabaster ("the City"). We affirm.

Facts and Procedural History

The City is governed by a mayor, who is elected by a citywide vote, and seven city council members, who are elected by voting districts or "wards." The City's population is predominantly white; according to the 1990 Federal decennial census, only 1,617 of the City's 14,732 residents are African-American.

In 1991, the City adopted a redistricting plan for its seven wards to reflect annexations and natural population increases. On December 30, 1991, the City obtained "preclearance" from the United States Attorney General ("the Attorney General") for its redistricting plan, as well as for its mayor-council form of government and its recent annexations, as required by § 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973c. Section 5 provides, in pertinent part, that covered jurisdictions (of which Alabama is one) may not enforce

any change affecting voting without first receiving a preclearance determination from the Attorney General finding that the proposed change is not racially discriminatory in purpose or effect. Under the City's precleared redistricting plan, the population in one of the City's seven wards would be predominantly African-American, while the population in the remaining six wards would be overwhelmingly white. The City's precleared plan also provided that pursuant to §§ 11-46-20 and -21, Ala. Code 1975, nonpartisan municipal elections were to be held on the fourth Tuesday in August in those years in which there was a Presidential election.

Since the 1991 preclearance, the City has approved 58 new commercial and residential annexations. Two of those annexations were of areas in which the plaintiffs resided at the time of the August 22, 2000, municipal election. Those two annexations were within a broader area known as the Weatherly subdivision, an area where the population is predominantly white. After it annexed an area, the City assigned the annexed area to a ward; the areas of the plaintiffs' annexations were both assigned to Ward 1, the only ward in which the

population was predominantly African-American.

On May 31, 2000, the City sought preclearance from the Attorney General for its annexations and ward assignments made after the 1991 preclearance. On July 10, 2000, the Attorney General precleared all of the City's commercial annexations, but requested additional information as to population statistics, demographic shifts, and election data regarding the City's residential annexations. The City responded, but the Attorney General considered its answers to be incomplete. The Attorney General nevertheless recognized the need for an expedited decision because of the impending August 22, 2000, elections. Accordingly, the Attorney General issued an order preclearing all of the annexations, but not all of the ward assignments. Specifically, the order refused preclearance for the assignment of the plaintiffs' two annexed areas to Ward 1, stating that assigning those annexed areas to Ward I diluted the African-American vote in that ward and, thus, defeated the goal of the Voting Rights Act of 1965. The City immediately notified the Attorney General, in a letter dated August 17, 2000, that it would comply with the preclearance order by

not counting the votes from these two annexed areas in the Ward I city-council race. The City also advised the Attorney General that it was unable to print new ballots for the two unprecleared annexed areas to Ward 1 before the upcoming election; however, it informed the Attorney General that it would accommodate the preclearance issue by having the voters in the two unprecleared annexed areas of the Weatherly subdivision vote at separate polling sites for the Ward 1 city-council election, thereby segregating their votes from the rest of the precleared Ward I electorate so that their votes for the Ward 1 council member would not be counted.

The City held its municipal election on August 22, 2000, as planned. The Ward I city-council election involved a contest between Bobby Lee Harris, the incumbent, and Todd Goode, the challenger. In the precleared areas of Ward 1, Harris, an African-American, garnered 326 votes, while Goode, who is white, garnered 287 votes. A total of 103 ballots were cast in areas included in the two Weatherly subdivision annexations. All of the ballots included votes for mayor and all but two ballots included votes for Ward 1 city council.

Pursuant to the City's promise to comply with the Attorney General's preclearance order, the City counted all the Weatherly subdivision votes for mayor but disallowed the votes in the two annexed areas for Ward 1 city council. The record suggests that all of the 101 votes cast in the Ward 1 city-council election by those residents in the Weatherly subdivision annexed areas were cast for Goode. Had those votes been counted, Goode would have won the race with 388 votes.

On August 28, 2000, the plaintiffs, who are among the 101 Weatherly subdivision voters whose ballots were not counted in the Ward 1 city-council election, sued the City, Steve Rauch (the mayor of the City of Alabaster), and Harris in the Shelby Circuit Court contesting the election result favoring Harris. The plaintiffs contended that disallowing their votes in the Ward 1 city-council election violated their federal and state constitutional rights to equal protection and their right to vote, guaranteed by § 2 of the Voting Rights Act of 1965. The plaintiffs asked the circuit court to nullify the results of the election, or, alternatively, to order that the Weatherly subdivision votes from the two annexed areas be counted in the Ward 1 city-council election.

The defendants filed motions to dismiss, arguing that state courts lacked subject-matter jurisdiction over the case under § 5 of the Voting Rights Act of 1965. The circuit court agreed, holding that it could not fashion a remedy without "disregarding . . . clearly established federal law." The circuit court subsequently dismissed the case, and the plaintiffs appealed.

Discussion

The question presented in this appeal is whether the circuit court erred in dismissing the plaintiffs' action for lack of jurisdiction.

Under our federal system, state courts and federal courts are presumed to have concurrent jurisdiction over cases arising under federal law. Congress, however, may confer upon federal courts exclusive jurisdiction by means of an exclusive statutory directive. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) Congress has pronounced that only federal courts can entertain "[a] ny action under this section [§ 5 of the Voting Rights Act]." 42 U.S.C. § 1973c. Accordingly, this Court, observing its constitutional duty to recognize the supremacy of federal law, has held that "cases involving

the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal courts." Mitchell v. City of Prichard, 538 So. 2d 1, 2 (Ala. 1988). The dispositive question in the present case is whether the plaintiffs' action "arises under" § 5, thereby divesting state courts of jurisdiction.

The plaintiffs maintain that their action is an election contest, at the heart of which is a claim that they were unconstitutionally denied the right to vote in the August 22, 2000, Ward 1 election.[1] They argue that any nexus their claim may have with § 5 of the Voting Rights Act is merely incidental and, thus, does not prevent the Shelby Circuit Court from exercising jurisdiction. In so arguing, the plaintiffs assert that their cause of action accrues under state election laws rather than under § 5 of the Voting Rights Act.

---

[1]In their complaint contesting the August 22, 2000, election, the plaintiffs claim that the City deprived them of their constitutional right to vote when it proceeded with the August 22, 2000, election before it obtained preclearance for the inclusion in Ward I of the areas annexed into the Weatherly subdivision.

The actual source of the plaintiffs' right to bring an action, however, is not necessarily determinative of the question whether their lawsuit "arises under" § 5. It is true that "[o]rdinarily, '[a] suit arises under the law that creates the cause of action.'" Hudson Ins. Co. v. American Elec. Corp., 957 F.2d 826, 828 (11th Cir. 1992) (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)). There are many instances, however, where claims brought under the color of state law nevertheless raise federal questions, thereby conferring upon federal courts subject-matter jurisdiction. As to these situations, the United States Supreme Court has said that federal subject-matter jurisdiction exists where the plaintiff's right to relief "depends on resolution of a substantial question of federal law." Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 28 (1983). We believe that federal-question jurisprudence extends to the present case, where state jurisdiction can exist only if a full adjudication of the plaintiffs' lawsuit is possible without consulting § 5.

The plaintiffs, in filing this election contest, have sought to

nullify the results of the Ward 1 City-council election so that one of two remedies requested in their complaint can be ordered. Accordingly, in addition to nullification, the plaintiffs have.asked the Shelby Circuit Court either (1) to conduct a recount of all votes cast in the Ward 1 election, including those votes from the annexed areas of the Weatherly subdivision that were originally excluded, or (2) to delay a second Ward 1 election indefinitely, pending the assignment of the allegedly disenfranchised Weatherly subdivision voters to a ward that has been precleared.

As to the first remedy the plaintiffs requested, the United States Supreme Court has clearly foreclosed the option of counting votes from unprecleared areas. In Clark v. Roemer, 500 U.S. 646 (1991), a federal district court in Louisiana permitted state judicial elections to go forward and allowed the winners of the elections to take office, even though the Attorney General had interposed valid objections to the election process for the judgeships. The Supreme Court, reversing the district court, held that "§ 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the

election." Clark, 500 U.S. at 654.

In the present case, the Attorney General has likewise interposed an objection, refusing to preclear the City's inclusion in Ward 1 of the areas annexed in the Weatherly subdivision. Any remedy authorizing a recount to include votes from these unprecleared areas would necessarily contravene the Attorney General's objection. Therefore, ordering this remedy would effectively overturn the Attorney General's preclearance adjudication, something that § 5 allows only federal courts to do.

The second remedy the plaintiffs requested, which involves nullifying the Ward 1 election and delaying a second vote until the City has obtained preclearance, likewise directly involve the application of § 5. In Allen v. State Board of Elections, 393 U.S. 544 (1969), Chief Justice Warren, writing for the Court, observed:

> "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973l (c) (1) (1964 ed., Supp. I). See Reynolds v. Sims, 377 U.S. 533, 555 (1964). . . .

> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."

Allen, 393 U.S. at 565-66 (footnote omitted).

The Supreme Court later addressed the postponement of elections in NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985). In that case, several residents of Hampton County, South Carolina, and the NAACP, a civil rights organization, sued the Hampton County election commission and several other related defendants, seeking to enjoin a school-board election as illegal under § 5. The plaintiffs alleged that several election procedures had been changed, but had not been precleared, including the scheduled date of the school-board election.

Ironically, the election commission's decision to change the date of the school-board elections was the result of an attempt by the commission to comply with § 5. The commission changed the date of the school-board elections after the Attorney General had precleared a previously-submitted election plan. The preclearance of that plan by the Attorney General had the effect of nullifying an election previously

held under the prior election rules. Therefore, in an effort to implement the new precleared plan, the commission scheduled a second election to occur on a special date. The federal three-judge panel held that, although implementation of the new election plan was a change under § 5, "the scheduling of the election and the filing period were simply 'ministerial acts necessary to accomplish the statute's purpose . . ., and thus did not require preclearance.'" Hampton County, 470 U.S. at 174. On appeal, the Supreme Court reasoned that its inquiry in § 5 cases was not whether the implemented election-procedure changes were actually discriminatory, but "whether the challenged alteration has the potential for discrimination." Id. at 181. Justice White, writing for the Court, concluded that changing the date of an election had such potential, and the Supreme Court reversed the lower court. The Court held that changes regarding the date of an election -- even when those changes affect only a single election cycle -- require preclearance. Id.

In the present case, we are unable to afford the plaintiffs the relief they request without doing violence to § 5. The United States

Supreme Court has made it clear that state courts, when considering a remedy altering an election process, must defer to the preclearance mandate of § 5. Specifically, the Court has said, "When a party to a state proceeding asserts that § 5 renders the contemplated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law." Hathorn v. Lovorn, 457 U.S. 255, 269-70 (1982). We are therefore confronted with a situation where we must make a § 5 preclearance adjudication before granting the plaintiffs their requested relief, or, indeed, any other relief with respect to the City's election procedures, something that § 5 clearly precludes our doing. For the same reason that state courts are powerless to grant relief to the plaintiffs, state courts are without jurisdiction to entertain the merits of the plaintiffs' claim, because a full adjudication -- which, of course, includes the possibility of granting relief -- requires consideration of a substantial question of law under § 5.

Conclusion

For the foregoing reasons, we affirm the Shelby Circuit Court's

judgment of dismissal for lack of jurisdiction.

AFFIRMED.

See, Johnstone, Woodall, and Stuart, JJ., concur.

Lyons and Harwood, JJ., concur specially.

Moore, C.J., and Houston, J., dissent.

LYONS, Justice (concurring specially).

Under § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), a few states, including Alabama, are prevented from enforcing changes affecting voting practices without first obtaining approval from the Federal government. I believe that Justice Black was right when he dissented from the United States Supreme Court's upholding the validity of § 5 against constitutional attack in South Carolina v. Katzenbach, 383 U.S. 301 (1966). Justice Black, in his dissent, made the following observations:

> "My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. . . . Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional

structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. . . . Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.' I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. . . . A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

"I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected. The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments. Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest

> indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress--denied a power in itself to veto a state law--can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases--they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval."

Id. at 358-61 (footnote omitted).

As the majority points out, the United States Supreme Court has interpreted § 5's proscription against changes in state law without advance federal approval to bar a state court from ordering relief that would otherwise require preclearance if such action were taken by any other branch of state government. Hathorn v. Lovorn, 457 U.S. 255, 269-70 (1982). Under Hathorn, the approved practice requires submission of the claim for relief to the Attorney General before application is made to the court. The Court observed:

> "Our holding does not prevent state courts from attempting to accommodate both state and federal interests.

> A state court, for examples might adopt the approach followed by the Chancery Court in this case, and order the parties to submit the proposed relief to the Attorney General. If the Attorney General registers an objection, the court might then order the parties to seek a declaratory judgment from the District Court for the District of Columbia."

Id. at 270 n.24 (emphasis added).

On the record before us, there is no indication that the request for a court-ordered stay of the election has received federal approval pursuant to § 5.

While I share the angst expressed in Justice Houston's dissenting opinion, criticism of the result in this case should, I respectfully submit, be directed to Congress.

Harwood, J., concurs.

HOUSTON, Justice (dissenting).

I would grant the second remedy requested by the plaintiffs and nullify the Ward I election and delay a second election to fill the Ward 1 council seat until the City has obtained preclearance from the Civil Rights Division of the Justice Department. The very idea that this Court by its opinion deprives 101 registered voters, who voted, of their

right to vote to keep from doing violence to § 5 of the Voting Rights Act of 1965, offends my sense of truth, justice, and the American way.

APPENDIX B -- ORDER OF THE CIRCUIT COURT OF SHELBY COUNTY

DATED SEPTEMBER 22, 2000

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
EIGHTEENTH JUDICIAL CIRCUIT

Brenda 0. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon

Plaintiffs,

CASE NO. CV-00-850

v.

City of Alabaster, an Alabama municipal corporation; Steve Rauch, in his official capacity as Mayor of the City of Alabaster; and, Bobby Lee Harris

Defendants.

ORDER

This cause is presently before the Court on the plaintiffs' complaint to contest the municipal election in the City of Alabaster held August 22, 2000. The allegation of the complaint is that the plaintiffs were denied the right to vote in the Ward I City Council

election, disenfranchising them in violation of their Constitutional and statutory rights. The plaintiffs seek to nullify the election of Bobby Lee Harris as Councilman for Ward 1 of the City of Alabaster.

Also pending before the Court is a motion to dismiss this cause filed on behalf of Bobby Lee Harris, the City of Alabaster, and Steve Rauch in his official capacity as Mayor of Alabaster; hereinafter collectively referred to as defendants. The Court has also allowed the Attorney General of the United States, hereinafter referred to as the Attorney General, to participate in these proceedings as amicus curiae.

It is undisputed among the parties and participants that the election at issue is subject to the jurisdiction of § 5 of the Voting Rights Act of 1965. See Perkins v. Matthews, 540 U.S. 379 (1971).

Specifically, no new voting practice is enforceable unless preclearance is obtained from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. §1973c. "Congress designed the preclearance procedure 'to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process'" Lopez v. Monterey County,

California, 519 U.S. 9 (1996). "Congress chose to accomplish this purpose by giving *exclusive authority* to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." Id. (Emphasis added). See also McDaniel v. Sanchez, 452 U.S. 130 (1981). By obtaining judicial preclearance, a covered jurisdiction, like the City of Alabaster, may obtain from the United States District Court for the District of Columbia, a declaratory judgment that the voting change would not have the purpose or effect of denying or abridging the right to vote on account or race or color. Clark v. Roemer, 500 U.S. 646 (1991).

In the instant case, the City of Alabaster sought preclearance from the Attorney General concerning the annexation of several tracts of land located in the Weatherly subdivision in the City of Alabaster. In addition to seeking approval of the annexation for mayoral purposes, the City also sought preclearance to place the annexed tracts in Ward I for purposes of City council representation. The City obtained preclearance for mayoral purposes; however, the Attorney General specifically refused to grant preclearance for the placement of

the Weatherly tract Ward 1. Specifically, the Attorney General determined that the City failed to carry "its burden of showing that the designation of Ward 1 has neither a discriminatory purpose nor a discriminatory effect." (August 16, 2000 letter from the U. S. Department of Justice to the City Attorney). The Attorney General further determined that the residents of the annexed portions of the Weatherly subdivision could vote in the mayoral race but, **could not** vote in the Ward I City Council race. Id

The relief sought by the plaintiffs in this cause, specifically to nullify the election of the City Councilman for Ward 1, to conduct a re-count of the votes cast in the Ward I City Council election and to grant a preliminary injunction to enjoin the filing of the office of Ward I Councilman would only be available through disregarding the clearly established federal law. A state court must not order relief that violates federal law. Hathorn v. Lovorn, 457 U.S. 255 (1982). The Alabama Supreme Court has held that "cases involving the interpretation of the preclearance requirements of Section 5 of the [F]ederal Voting Rights Act are within the exclusive jurisdiction of the federal courts."

Mitchell v. City of Prichard, 538 So. 2d 1 (Ala. 1988). While the Court is not unsympathetic to the plight of the plaintiffs in that they were unable to cast legal votes in the race for Ward 1 City Council representative[1] for the reasons set out previously in this Order, it is without authority to rule otherwise.

Accordingly, the plaintiffs' request for preliminary injunctive relief, as well as any and all other relief sought is hereby **DENIED**. Further, the defendants' motion to dismiss is due to be, and is hereby **GRANTED**.

DONE AND ORDERED on this the day of [22nd] day of [September], 2000.

/S/
D. Al Crowson
Circuit Judge

---

[1]which Mr. Edward Still, counsel for Defendant, Bobby Harris concedes"...(for the purposes of the Motion to Dismiss and Motion for Preliminary Injunction) that all ninety-three (93) votes from the newly- annexed Weatherly residents were cast for Mr. Goode." See letter from Edward Still dated September 21, 2000. Mr. Goode was Bobby Harris' opponent.